TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted], 1911

No. [redacted] 85

THE UNITED STATES, APPELLANT,

vs.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, TRADING AS ELLICOTT MACHINE COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 8, 1909.

(21747)

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OCTOBER TERM, 1909.

No. 521.

THE UNITED STATES, APPELLANT,

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CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, TRADING AS ELLICOTT MACHINE COMPANY.

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1 In the Court of Claims of the United States.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, TRADING AS ELLICOTT MACHINE COMPANY, CLAIMANT, *vs.* UNITED STATES. } No. 29907.

I. PETITION.—*Filed Dec. 10, 1906.*

To the Honorable the Justices of the Court of Claims:

The above-mentioned claimant respectfully represents:

I.

That the said Charles E. Ellicott and John B. Norris are copartners, trading under the firm name of Ellicott Machine Company, and that they both are citizens and residents of the State of Maryland, doing business in the city of Baltimore, and bring this suit in their own right as copartners of said Ellicott Machine Company, in respect to the matters hereinafter set forth.

2 II.

That the Isthmian Canal Commission (acting for the United States), being desirous of purchasing six steel dump barges, heretofore, to wit, some time in the month of April, 1906, circulated in due form a circular letter and advertisement asking for proposals for the erection and delivery of six steel dump barges; the bids on the same to be opened at the office of the general purchasing officer of the Isthmian Canal Commission at Washington, D. C., on April 27, 1906; that only one proposal was received at that time, and a new circular and advertisement was issued asking for sealed proposals for the erection and furnishing of six steel dump barges, said proposals to be opened on May 21, 1906, at the above-named office of the general purchasing officer in Washington, D. C.

III.

That under this second advertisement and circular two proposals were received and opened on May 21, 1906, one of the bidders being the Holland-American Dredge Building Syndicate, whose bid was thirty-five thousand dollars ($35,000) for each barge, delivered at Colon, Isthmus of Panama, and the other the bid of claimant, the Ellicott Machine Company, for one hundred and forty-eight thousand four hundred dollars ($148,400) for the six barges, delivered at Baltimore, Maryland.

IV.

That after these proposals had been duly considered they were laid aside and new proposals called for. This third lot of proposals was

asked for through advertisement and circular No. 310–C and specifications thereto annexed, copies of which circular No. 310–C
3 and specifications thereto attached are annexed to the contract, an original of which is filed herewith as "Claimant's Exhibit No. 1;" that this third lot of proposals was opened on June 8, 1906, in the said office of the general purchasing officer of the Isthmian Canal Commission at Washington, D. C. The bidders and bids were as follows:

William Cramp & Sons, Philadelphia	$31,500 each.
Ellicott Machine Company, Baltimore, Md	16,900 each.
Fore River Ship & Engine Building Company, Quincy, Mass	50,000 each.
Maryland Steel Company, Sparrow's Point, Md	27,950 each.
T. S. Marvel Ship Building Company, Newburgh, New York	26,000 each.
Motley, Green & Company, New York	22,750 Colon.
	20,750 Liverpool. (knocked down.)
Newport News Shipbuilding Company, Newport News, Va	149,000 for the lot.
William E. Winant, Brooklyn, New York	111,000 " " "

(This bid, however, was informal, no guarantee bond being attached.)

All these bids were mailed to F. B. Maltby, division engineer of the Isthmian Canal Commission at Cristobal, Isthmus of Panama, and claimant being the lowest bidder, the said F. B. Maltby, by letter of June 21, 1906, addressed to D. W. Ross, general purchasing agent of the Isthmian Canal Commission, Washington, D. C., and by second letter addressed to said D. W. Ross, of date of June 26, 1906, approved the awarding of the contract for the six steel dump barges to
4 claimant on its proposal of June 7, 1906, provided the arrangement of hinges and hoisting gear on the barges should be made in conformity with suggestions contained in said letter of June 26 and in a sketch which accompanied said letter.

V.

That the proposal, opened June 8, 1906, from claimant was made in due form, according to legal requirements and in conformity with the specifications and circular letter No. 310–C, with certain modifications as shown on schedule annexed to proposal, and as also shown on drawing No. 2105, dated June 7, 1906, a copy of said drawing and schedule being attached to and made part of the proposal.

VI.

That on July 15, 1906, claimant received letter from D. W. Ross, general purchasing agent of the Isthmian Canal Commission, enclosing contracts in triplicate to be executed by claimant and defendants, which contracts purported to provide for the erection and delivery of the six steel dump barges in accordance with the claimant's proposal opened June 8, 1906; but that claimant returned said contracts in triplicate on July 16, 1906, together with a letter of that date addressed to said D. W. Ross. Said letter reads in part as follows:

"We have your favor of June 14th, 1906, with enclosures as noted. In order to correspond with our proposal of June 7th, 1906, Article I should read as follows:

"Article I. That the said Ellicott Machine Company shall construct, erect and deliver to the Isthmian Canal Commission, at Baltimore, Maryland, six steel dump barges in accordance with specifications contained in circular No. 310-C of the Isthmian Canal Commission, dated May 29th, 1906; with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and subject to such amendments as to details of hinges, hoisting gear and method of securing timber lining to hoppers, as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with the accompanying sketch, a copy of which specifications, drawing, letter and sketch are attached herewith and form part of this contract."

Said letter further says that "our drawing No. 2105 was not intended to show working details, but solely to limit the conditions of displacements, load, and draft. As long as these are maintained we shall be pleased to follow such reasonable design of working details in arrangement and distribution of material as Mr. Maltby or his inspector may require." And the letter further says, "We return contracts."

VII.

That thereupon, at the request of said D. W. Ross and F. B. Maltby, claimant wrote a letter, addressed to said F. B. Maltby, under date of July 27, 1906, a copy of which letter is annexed to the contract filed herewith as "Claimant's Exhibit No. 1," for the purpose of furnishing additional details called for in the letter of said F. B. Maltby of June 26, 1906, of hinges, hoisting gear, and method of securing timber lining to hoppers. Enclosed with such letter was a blueprint marked "No. 2105," copy of which blueprint is annexed to the contract herewith, filed as "Claimant's Exhibit No. 1."

VIII.

That said blueprint No. 2105 so inclosed was exactly similar to blueprint No. 2105, which was first filed with the bid of claimant June 7, 1906, except that said blueprint inclosed with letter of July 27 contained the following words written on the face thereof:

"*Schedule of displacement, load, and draft.*

Capacity of bins, cu. yds	350
Displacement of hull as shown on 8'-0" draft line, 21,446 cu. ft., at 65 lbs. per cu. ft	1,394,000
350 cu. yds., total load, at 3,240 lbs. per cu. yd	1,134,000
Net weight of barge, including equipment	260,000 lbs."

That the above results were shown by drawing No. 2105 as originally submitted, but were added specifically in figures on said drawing for the purpose of making more clear the total net weight of the barge, namely, 260,000 pounds.

IX.

That claimant's letter of July 27, inclosing said blueprint No. 2105, stated that the weight of the barges could be distributed in any way the representative of the Isthmian Canal Commission might desire. Said letter further said: "It has been the custom on previous similar contracts, the total weights and general design being clearly specified and defined in the contract, to get out the working details under the supervision of a representative of the contracting officer as soon as possible after the execution of the contract." A copy of this letter was also mailed to said D. W. Ross.

X.

That on August 8 claimant was informed, through message from D. W. Ross to claimant's representative in Washington, W. A. Pate, that cablegram had been received by said D. W. Ross from said F. B. Maltby, stating that contract with Ellicott Machine Company, in accordance with their letter of July 27 and drawing No. 2105,
7 would be satisfactory, and said D. W. Ross further informed said W. A. Pate that contract was being prepared in conformity therewith.

XI.

That on August 17, 1906, the contract which is annexed hereto as "Claimant's Exhibit No. 1," was delivered to claimant by said Isthmian Canal Commission and was signed by John B. Norris on behalf of claimant and returned on that day to said Isthmian Canal Commission; said contract, although in fact signed on August 17, bears date July 12, 1906; and that on August 28, 1906, a copy of said contract, duly executed by the said claimant and Theodore P. Shonts, chairman of said Isthmian Canal Commission, was sent to claimant by registered mail and received in due course; whereupon claimant immediately took steps to erect said six steel dump barges in accordance with the provisions of said contract, and made preparation for the due and proper performance thereof, and in so doing spent much valuable time and money.

XII.

Claimant avers that it is ready and willing to carry out said contract in strict accordance with the terms thereof and has at all times been ready and willing to so perform the same and has on numerous occasions so informed the defendant, its agents and employees; but that it has been prevented from so doing by the acts of the said

United States, its agents and employees, and has thereby suffered great pecuniary loss and damage.

XIII.

That said defendant, its agents and employees, have prevented claimant from performing said contract in numerous ways, and among others as follows:

8 That on August 30, 1906, claimant prepared an itemized list of materials covering the six barges and distributing the total weight of 260,000 pounds in the best possible manner, according to claimant's judgment; that this list of materials was sent by letter of August 30, 1906, to said D. W. Ross, and at the request of said D. W. Ross said list of materials was, on September 1, 1906, enclosed in a letter to T. M. Post, inspector of dredges for Isthmian Canal Commission; that claimant wrote again to said D. W. Ross on September 7, 1906, asking that some action be taken, as the loss of time was of vital importance to it; that, although claimant has made numerous attempts to get the said defendant, its proper agents and employees, to approve said list of materials, the said agents and employees have refused at all times to approve said list of materials, or to modify the same, or to submit to claimant any new list of material; and that on September 8 the said T. M. Post wrote a letter to claimant stating that he had been directed to withhold approval of the bill of materials, but that the same had been forwarded to said F. B. Maltby, and that a cable reply was expected from Mr. Maltby shortly; that claimant received no answer to its request that bill of material be approved, and wrote again to said D. W. Ross on September 14, asking what instructions concerning the contract had been received from Mr. Maltby, and claimant was thereupon advised that a cablegram had been received from F. B. Maltby, which read as follows:

"Insist Ellicott follow our specifications as to framing and plates on barges."

And that in answer to this information claimant wrote, under date of September 15, 1906, to said D. W. Ross, stating that it was willing to return to the original specifications as to framing and plates, but if this was insisted upon it would decrease the displacement to some extent, and consequently the carrying capacity of the barges;

9 otherwise the weight of the barges would exceed the total called for in the contract, namely, two hundred and sixty thousand (260,000) pounds.

Claimant further suggested in this letter that the original specifications as to framing and plates could be carried out and at the same time the same capacity, as shown on drawing No. 2105, maintained if the cost of the additional material was covered by a supplementary contract.

XIV.

That at the request of said D. W. Ross claimant then submitted a new drawing and a letter of October 1, estimating for a new barge according to original specifications, but not according to barges contracted for in claimant's contract with defendant.

XV.

Claimant further shows that the Isthmian Canal Commission has refused to carry out the said contract dated July 12, 1906; that it has refused to award claimant a new contract in accordance with letter of October 1, although claimant, in order to meet the wishes of the said defendant, its agents and employees, offered to cancel its present contract and enter into a new contract in accordance with drawing No. 2107 and claimant's letter of October 1, 1906; but that, on the contrary, said D. W. Ross showed claimant a cablegram from F. B. Maltby, requesting said D. W. Ross to award the contract for the said six barges to the Newport News Company on its original bid of one hundred and forty-nine thousand dollars ($149,000), and claimant is informed and believes that said Isthmian Canal Commission has now awarded to the Newport News Company the contract for the erection of the said six barges which defendant is under contract to buy from claimant.

10

XVI.

Claimant further avers that the said D. W. Ross has informed it that defendant would not receive the barges unless built according to original specifications; and claimant has also received a letter from T. P. Shonts, chairman of the Isthmian Canal Commission, dated October 5, 1906, stating that the United States is prepared to carry out the contract with claimant, provided barges are erected strictly in accordance with the detailed specifications made a part of and annexed to the contract, and claimant avers that this letter is tantamount to a refusal to accept the barges if built according to the contract dated July 12, 1906.

XVII.

That Article I of said contract provides as follows:

"That the said Ellicott Machine Company shall construct, erect, and deliver to the Isthmian Canal Commission at Baltimore, Maryland, six (6) steel dump barges, in accordance with specifications contained in circular 310-C of the Isthmian Canal Commission, dated May 25th, 1906, with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and revised July 27th, 1906, outlined in letter of Ellicott Machine Company dated July 27th, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter

of F. B. Maltby, division engineer, dated June 26th, 1906, with accompanying sketch, copy of which specifications, drawing, letters, and sketch are attached hereto and form a part of this contract."

And claimant avers that it is ready and willing and has at all
11 times been ready and willing to erect the barges in accordance with the provisions of this contract, and through its attorney, Francis K. Carey, by letter of October 26, 1906, has so notified defendant; but that said defendant, its agents and employees, have refused to accept the said six steel dump barges unless they are erected strictly in accordance with the "detailed specifications made part of and annexed to the contract;" and claimant avers that under the provisions of said contract it is not compelled to erect the six steel dump barges in strict accordance with the original detailed specifications, but in accordance with these specifications as modified by the said contract.

XVIII.

Claimant further shows that the difference between the cost to the claimant of building the barges in accordance with the terms of said contract and the amount of $91,400, which, by the terms thereof it was entitled to receive therefor, is the sum of $30,000; all of which gains and profits claimant has been wrongfully deprived of by the action of the defendant, its agents and employees, as hereinbefore set forth.

XIX.

Claimant avers that it is entitled to the moneys herein named, and that said amount is justly due and owing to it from the United States after allowing all just credits and setoffs; that no assignment or transfer of the claims hereinbefore set forth or any part thereof or any interest therein has been made by it to any one whomsoever or by any one in its behalf, and that the said John B. Norris and Charles E. Ellicott have at all times borne true allegiance to the United States.

12 Wherefore, the premises considered, claimant demands judgment against the United States in the sum of thirty thousand dollars ($30,000).

ELLICOTT MACHINE CO.,
Claimant.
CHARLES E. ELLICOTT.
JOHN B. NORRIS.

A. A. HOEHLING, JR.,
Attorney for Claimant.

Post-office address of claimant: Ellicott Machine Company, Bush and Severn streets, Baltimore, Md.

Post-office address of attorney for claimant: A. A. Hoehling, jr., 1416 F street, Washington, D. C.

STATE OF MARYLAND.

Baltimore City, to wit:

I hereby certify that before me, the subscriber, a notary public of the State of Maryland in and for Baltimore city aforesaid, personally appeared Charles E. Ellicott and John B. Norris, the copartners of the Ellicott Machine Company, and severally made oath in due form of law that the several matters and things set forth and contained in the foregoing petition by them subscribed are true as they verily believe.

Subscribed and sworn to before me this 30th day of November, nineteen hundred and six.

[L. S.] HOWARD D. ADAMS,
Notary Public.

13 EXHIBIT No. 1.

Contract drawn on Washington order, No. 3940, dated 7/12, 1906.

This agreement, entered into this 12th day of July, 1906, between the Isthmian Canal Commission, for and on behalf of the United States, of the first part, and the Ellicott Machine Company, represented by John B. Norris, a member of the firm, of Baltimore, State of Maryland, of the second part:

Witnesseth: That the said Isthmian Canal Commission, for and on behalf of the United States of America, and the said Ellicott Machine Company, do covenant and agree, to and with each other, as follows:

Article 1. That the said Ellicott Machine Company shall construct, erect, and deliver to the Isthmian Canal Commission at Baltimore, Maryland, six (6) steel dump barges, in accordance with specifications contained in circular 310-C of the Isthmian Canal Commission, dated May 29th, 1906, with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and revised July 27th, 1906, outlined in letter of Ellicott Machine Company dated July 27th, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with accompanying sketch, copy of which specifications, drawing, letters, and sketch are attached hereto and form a part of this contract.

Article 2. The above steel dump barges shall be constructed, erected, and delivered by the party of the second part to the Isthmian Canal Commission at Baltimore, Maryland, as follows:

2 barges on or before December 6, 1906.
2 barges on or before February 19, 1907.
2 barges on or before May 5, 1907.

Article 3. That the party of the first part, by its duly authorized agent, shall have the right to inspect at any time during the
14 process of construction of these barges, any and all material and workmanship used, or to be used, in said construction, and such inspection of said barges, and of the material used, or to be used,

in the construction thereof, and of the workmanship thereon, may be made by the party of the first part, or its duly authorized agent, at any place where said materials may be found, and at the places of construction of said barges. In addition to the above, when said barges, or either of them, are pronounced by the party of the second part to be completed and ready for final inspection, such inspection may be made by the party of the first part, by its duly authorized agent, at the place or places where such barges, or either of them, have been constructed, such inspection being for the purpose of determining whether the same, or either of them, meet the requirements set forth in the letters, specifications, and blue print mentioned in article 1 hereof, and all of said inspections, whether preliminary or final, the party of the first part, by its duly authorized agent, shall have the right to reject any and all material used, or to be used, in the construction of said barges, or either of them, or in the workmanship thereon, when, in the judgment of the party of the first part, by its duly authorized agent, the same or any part thereof, does not conform to the requirements above mentioned.

Article 4. It is further expressly understood and agreed that the time of performance shall be the essence of this contract, and that in case of failure of the party of the second part to complete this contract within the time herein specified and agreed upon, namely, on or before May 5th, 1907, that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible, of definite ascertainment and proof, it is hereby stipulated and agreed that the amount of said damages shall be estimated, agreed upon, stated, liquidated, and fixed in advance, and they are hereby agreed upon, stated, liquidated, and fixed at the sum of fifteen dollars ($15.00) for each and every day the party of the second part shall delay in the completion of each of the said barges covered by this contract, and the party of the second part hereby agrees to pay to the United States of America as such liquidated damages, and not by way of penalty, the sum of fifteen dollars ($15.00) for each of said barges for each and every day the party of the second part shall delay in the completion of this contract, and that said United States of America shall also have the right to recover from the party of the second part all costs of inspection and superintendence incurred by the United States of America during such period of delay, and also whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

And said party of the first part may deduct or retain all the above-mentioned sums out of or from any money or reserved percentage that may be due or become due the party of the second part under this agreement.

Provided, however, That if the party of the second part shall by strikes, epidemics, local or state quarantine restrictions, or by abnormal force or violence of the elements, be actually prevented from completing the work or delivering the materials at the time herein agreed

upon, and such delay is without contributory negligence of the party of the second part, such additional time may, in the discretion of the chairman of the Isthmian Canal Commission, be allowed for such completion as, in the judgment of the party of the first part, or its successors, shall be just and reasonable.

Provided further, That in case of such delay the party of the second part shall give immediate notice in writing to the chairman of the Isthmian Canal Commission of the necessity for such extension, and said chairman may, in his discretion, accept such delays as sufficient cause for waiving said deductions; but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, except as so waived, and said rights and obligations shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

Article 5. The party of the second part further agrees to hold and save the United States harmless for and against all and any demand or demands of any nature or kind for or on account of the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Article 6. The party of the second part further agrees and contracts to keep the hull, machinery, fittings, and equipments of
16 the barges herein contracted for, and all machines and appliances provided for and used, or to be used, in the construction thereof, duly insured during the construction thereof and until the same are delivered and accepted by the Isthmian Canal Commission, which insurance shall be renewed and increased from time to time by and at the expense of the party of the second part, the loss, if any, to be stated in the policies as payable to the United States of America, and such insurance is to be effected in such manner and in such companies as shall be approved by the chairman of the Isthmian Canal Commission, and in an amount to be fixed from time to time by him, not exceeding, however, at any time, the sum of the payments made under this contract.

It is stipulated and agreed that no Member of or Delegate to Congress, nor any person holding any office or appointment under the Government of the United States, or under the Isthmian Canal Commission, is or shall be admitted to any share or part of this contract, or any interest of, in, or to the same, or any part thereof, or to any benefit or payment which may arise therefrom.

Article 7. It is further understood and agreed between the parties hereto that in case of the failure or neglect of the said party of the second part to fulfill the stipulations of this contract according to the true intent and meaning thereof, then the party of the first part is authorized to direct purchases to be made of all necessary materials, and to cause the construction of the barges to be completed as herein specified and required, and the said party of the second part shall be liable to the United States of America, in such event, for any

excess in the cost of the construction of the barges over the price hereinafter named and stipulated to be paid therefor to said party of the second part.

Article 8. The barges herein contracted for shall be completed in accordance with the specifications, letter, and blueprint annexed hereto and made a part hereof, and shall be ready for delivery to the party of the first part on or before the times hereinbefore set forth; but the lien of the party of the first part upon said barges, and upon the materials for use in the construction thereof, respectively and collectively, for all amounts paid on account thereof, shall commence with the first payment, and shall thereupon attach to the work done and materials furnished or provided as the work progresses, and shall in like manner attach from time to time, and at all times, as
17 the work progresses and as further payments are made, and shall continue until it shall have been properly discharged by the delivery and acceptance of said dredges, or otherwise in the discretion of the Isthmian Canal Commission.

Article 9. The party of the first part agrees to pay, or cause to be paid, to the party of the second part the sum of sixteen thousand nine hundred dollars ($16,900) for each of the barges herein contracted for, making a total price for the six barges of one hundred and one thousand four hundred dollars ($101,400), upon their construction and delivery in accordance with the terms of this contract and the papers attached hereto. Payments shall be made by the party of the first part to the party of the second part in monthly instalments as the work progresses, to the amount of work done in each month, less the reservation of ten per centum (10%) of said amount, which work shall be ascertained by estimate made by the party of the second part, approved in writing by the inspector of the Isthmian Canal Commission in charge of said work; the balance of the payments on these barges shall be made after construction, erection, delivery, and acceptance at Baltimore, Maryland.

Article 10. Neither this contract, nor any interest therein, shall be transferred to any other party or parties, and in case of such transfer the United States of America may refuse to carry out this contract with either the transferor or the transferee, and all rights of action for any breach of any of the provisions of this contract by the party of the second part are reserved to the United States of America.

Article 11. It is further stipulated and agreed by and between the parties hereto that no expense outside this contract shall be incurred, nor shall the United States be held liable for any extra work beyond that stipulated in this contract, and in the specifications, letter and blueprint constituting a part hereof, unless such change and expense shall have first been authorized and approved in writing by the chairman of the Isthmian Canal Commission.

Article 12. If, at any time, during the prosecution of this work, it shall be found advantageous or necessary to make any change or modification in said barges, or either of them, and this change or modification should involve such alteration in the specifications as to char-

acter, quantity, and quality, whether of labor or material, as
18 would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices both of material and labor thus substituted for those specified in the original contract, and before taking effect must be approved by the chairman of the Isthmian Canal Commission: Provided, That no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligations arising from such modification was incurred.

In witness whereof, the parties hereto, and each of them, have hereunto set their hands to this and to two duplicate instruments of identical tenor and effect the date first hereinbefore written.

In presence of:

W. P. ARMSTRONG, as to

ISTHMIAN CANAL COMMISSION.
By F. P. SHONTS, *Chairman.*

W. A. PATE, as to

ELLICOTT MACHINE COMPANY.
By JOHN B. NORRIS,
One of the Firm.

NOTE.—The name of the principal intended to be bound as party of the second part, whether an individual, a partnership, or a corporation, should be inserted in and signed to the contract. An officer of a corporation, a partner, or an agent signing for the principal should add his name and designation after the word "By" and under the name of the principal.

I certify to correctness of facts:

D. W. ROSS,
General Purchasing Officer.

19 # E-339.

JULY 27, 1906.

F. B. MALTBY, *Division Engineer*
(Through D. W. Ross, General Purchasing Officer,
Isthmian Canal Commission),
Washington, D. C.

DEAR SIR: In accordance with verbal request of D. W. Ross, general purchasing officer, in connection with our bid June 7th we submit print # 2105 revised July 27th, specifying details as called for in your letter June 26th, 1906, of hinges, hoisting gear and method of securing timber lining to hoppers.

We have also inserted on the drawing a schedule of displacement, load and draft showing a total net weight for the barge of 260,000 pounds. You will note that this corresponds with the note shown on print originally submitted with bid, and this weight may be distributed in any way your representative may desire.

It has been the custom on previous similar contracts, the total weights and general design being clearly specified and defined in the contract to get out the working details under the supervision of a representative of the contracting officer as soon as possible after the execution of contract.

We shall be very glad if this contract can be awarded at once as the season is approaching in which such work cannot be advantageously prosecuted.

We take this opportunity to call your attention to the bid of the next lowest bidder, Winant of Brooklyn, N. Y.

A schedule of displacement on this bid will show as follows:

Displacement of hull as shown on maximum permissible draft line of 8′ 0″—20,263 cu. ft. at 65 lbs	1,317,095 lbs.
Deduct weight of minimum permissible loads—350 cu. yds. at 3,240 lbs.	1,134,000 lbs.
Net weight of barge including equipment	183,095 lbs.

From the above you will note that we are offering about 80,000 pounds more material on each barge than our competitor at about $1,000.00 less per barge.

Respectfully,

ELLICOTT MACHINE COMPANY.

20 ISTHMIAN CANAL COMMISSION, CANAL ZONE,
DEPARTMENT OF ENGINEERING AND CONSTRUCTION,
June 26, 1906.

File 33–C.

Mr. D. W. Ross,
General Purchasing Officer, I. C. C.,
Washington, D. C.

DEAR SIR: I am returning to you herewith, the papers received in connection with bids for dump barges. I send you a small sketch showing the desired arrangement of the hinges on the hopper doors, and the method of securing timber lining to hoppers.

It is noted that the drawing submitted by the Ellicott Machine Works does not show any details as required by the specifications. It is presumed however, (and we should insist on it) that the framing will be in strict accordance with our specifications. Their drawings show three hoppers, each 20 ft. long, but a small sketch shows the chains attached to the doors at the centre of each hopper, as well as at the ends, and this should be done. Chains supporting the doors should be attached to them at least every ten feet. The arrangement for hoisting the doors should be such as will enable us to drop them readily, through the use of a clutch of some sort. This is a very ordinary method, and it is only mentioned so that there may be no misunderstanding about it.

The sketch which I enclose is suggestive only, and may be varied in detail as the manufacturer desires; the requirements only being that the hinge on the door should be heavy and thoroughly bolted to the door; that it should be placed in such a position that when the

door is dropped it will not pinch on the sides of the opening: and furthermore, that they be secured by links to the fastenings on the sides of the hopper, above the light water line. The purpose of this arrangement is to enable us to pull up the doors, repair them and their hinges without docking the barge.

According to our specifications all of these details should have been furnished by the bidders with their proposal, and would have been approved or disapproved when accepting their bids. I
21 am willing, however, to waive this point, provided they are willing to build these details in the way which it was intended to cover in the specifications.

Yours, very truly,

(Signed) F. B. MALTBY,
Division Engineer.

Enclosures.
C. D.

(Form 607-D.)

(When principal if an individual or a partnership, and surety is a corporation.)

Bond for fulfillment of contract.

Know all men by these presents, that we, Charles E. Ellicott and John B. Norris, trading as Ellicott Machine Company, as principal, and United Surety Company, a corporation existing under the laws of the State of Maryland, as surety, are held and firmly bound unto the United States of America, in the penal sum of twenty thousand two hundred and eighty dollars ($20,280.00), for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Given under our hands and seals this thirteenth day of August, 1906.

CONDITIONS.

The conditions of the above obligation are such, that if the said above-bounden Ellicott Machine Company, their heirs, executors, administrators or successors, shall well and truly, and in a satisfactory manner, fulfill the contract hereto annexed, and deliver the articles mentioned within the time specified, and to the satisfaction of the said Isthmian Canal Commission, then this obligation to be void and of no effect, otherwise to remain in full force and virtue.

In witness whereof the principals hereto have set their hands and seals on this thirteenth day of August, 1906, to this, and to two duplicate instruments of identical tenor and effect, and the surety
22 hereon has caused the same to be executed by its proper officer thereto duly authorized under a resolution of its board of

directors, passed on the 11th day of January, 1906, a copy of which is hereto attached.

In the presence of:

THOMAS H. ORTT, as to

CHARLES E. ELLICOTT. [L. S.]
(Principal).

THOMAS H. ORTT, as to

JOHN B. NORRIS. [L. S.]
(Principal).

UNITED SURETY COMPANY,
By HENRY G. PENNIMAN,
As its Vice-President.

Attest:

E. D. LIVINGSTON,
As its Ass't Secretary.

[L. S.]

(NOTE.—Here follows attested copy of resolutions empowering officers of the United Surety Company to execute bonds and other undertakings; also certificate of notary public as to execution and acknowledgement of foregoing instrument; both, however, here omitted in printing.)

Circular 310–C.

(Advertisement.)

ISTHMIAN CANAL COMMISSION,
OFFICE OF THE GENERAL PURCHASING OFFICER.
Washington, D. C., May 29, 1906.

Sealed proposals in triplicate will be received at this office until 2.30 p. m. June 8, 1906, at which time they will be opened in public for furnishing and delivering, free of all charges, at either Colon (Atlantic port), Isthmus of Panama, or any Atlantic or Gulf port in the United States, six (6) steel dump barges.

Each proposal must be accompanied by a property guaranty,
23 which should be prepared on one of the two forms hereto attached—either by a surety company or individual guarantors as bidders may elect.

Each individual guarantor will be required to justify in a sum equal to not less than twenty per centum of the value of the work or material covered by the proposal which he guarantees.

Preliminary inspection will be made at the point of manufacture or purchase to determine whether the material meets the requirements set forth in the specifications and final inspection will be made at the point of delivery as above.

Bidders must state where they propose to make delivery, the time when they propose to commence delivery, and within what time they will complete delivery after the receipt of notice of award, and the

general purchasing officer reserves the right, before making award or entering into contract, to fix a specified sum per day as liquidated damages for delinquency on the part of the contractor in performance of agreement.

Time of delivery will be considered in making the award as these barges are urgently needed.

All correspondence relating to this circular should refer to circular 310–C.

The commission reserves the right to reject any or all bids or accept any bid in the aggregate or part of same as may be deemed most advantageous.

Proposals must be signed by the bidder and inclosed in sealed envelope, marked "Proposals for steel dump barges, to be opened at 2.30 p. m., on the 8th day of June, 1906."

Cuts and full descriptions of the barges offered should be submitted with bids.

D. W. Ross,
General Purchasing Officer.

Zone Req. 753–A.

	Unit price.	Total price.
6 steel dump barges:		
Erected and delivered, free of all charges, at Colon, Isthmus of Panama ---------- each--		
Erected and delivered, free of all charges, at any Atlantic or Gulf port ---------- each--		

24 SPECIFICATIONS.

Proposals are invited for furnishing and delivering complete, free of all charges, at either Colon, Isthmus of Panama, or at any Atlantic or Gulf port, 6 steel dump barges, each with a capacity of not less than 350 nor more than 400 cubic yards.

If bidders do not care to bid for delivery at Colon bids will be considered for delivery at any Atlantic or Gulf port in the United States.

To permit the use of stock sizes of material and usual shop practice and patterns, a certain latitude in the details of construction will be permissible.

The following specifications and requirements are general only as indicating the class of construction desired.

Barges of heavy construction for rough service, built in accordance with best modern marine practice, are desired.

Bidders will be required to submit with their proposals plans in sufficient detail to show the proposed size of members and details of construction.

Bidders should state the time of delivery which they guarantee, and the time of delivery will be considered in awarding the contract.

The breadth of the barges should not be less than 25 feet nor more than 32 feet. They should have sufficient depth and length to carry a full load of sand on a draft of not more than 8 feet, and with not

less than 30″ freeboard when loaded. They will be rectangular in plan, with rake at each end about 11″ long.

There should be at least two hoppers with water-tight bulkheads between them extending to the deck. Bulkheads forming end of hoppers should extend entirely across the barge, framed to floor and deck beams and side beams, and to be made water-tight. In case only two hoppers are built, each compartment alongside of each hopper should have a water-tight bulkhead near its center. All bulkheads to be framed to frames, floor, and deck timbers with the best marine practice.

The sides of the hoppers should have an inclination of at least 60° with the vertical. Hopper doors must open the full size of the bottom of the hopper. The sides of the hopper must be framed with not less than 4″ x 5″ x ⅜″ angles, spaced 24″ center to center, plated with 21-pound plate and lined throughout with 4″ x 8″ timbers set on end to prevent injury to hoppers when loading rock. This lining must be supported on the bottom by an angle or channel iron so formed as to hold the bottom of this timber lining in place. The tops of the timbers must be held in place in the same manner. It will not be permissible to bolt this timber to the sides of the hopper.

The hopper doors should be of wood at least 6″ in thickness, lined on both sides with 15-pound plate; this lining to be held in place by screw bolts passing entirely through the doors. Hinges for supporting the doors should be of the loose-link type of cast steel, thoroughly secured to the hull and to the doors. Details should be furnished.

Mechanism for supporting and operating the hopper doors must be shown in detail. It will be operated by manual power.

FRAMING.

Floor beams forward and aft of the hoppers and in the rake should not be less than 10″ deep and extend in one piece to the turn of the bilges. They will be spaced 24″ center to center. Frames to be not less than 3½″ x 5½″ angles overlapping the floors not less than 18″ and connected with them and to floor beams with proper gusset plates. Bilges to be of as short radius as it is practicable to bend the angles and plates.

In addition to the transverse bulkheads mentioned above there will be a water-tight bulkhead at each end of each rake.

Transverse water-tight bulkheads will be made of 10.2 pound plate with double-riveted lap joints, stiffened with vertical angle bars 3″ x 3″ x 5 1/6″, spaced 2′ apart, except that the plates forming the ends of the hoppers will be of 21-pound plate, stiffened with 4″ x 4″ x ⅝″ angle bars, spaced 2′ apart.

In the space forward and aft of the hoppers there should be a central longitudinal bulkhead of 10.2 pound plate, fastened at the top of the floor beams and deck beams by 4″ x 4″ x ⅝″ angle; it will be stiffened by vertical 3″ x 3″ x 5/16″ angles, spaced 2′ apart.

This bulkhead should extend from the hoppers to each end of the barges.

26 In addition to this bulkhead there will be 2 longitudinal lattice trusses, one on each side midway from the center bulkhead to the side of the hull. They will have top and bottom cords of 3″ x 3″ x 5/16″ angles riveted to each floor and deck beam, lattice bars to be 3″ x 3″ x 5/16″ angles made in double panels and joined top and bottom with proper gusset plates with not less than 3 rivets in each landing. These trusses will extend from the hoppers to the rake.

In the rake there should be a 3″ x 3″ x $\frac{3}{8}$″ angle stanchion secured to each deck beam and floor timber on line with the said trusses.

Deck beams to be of 5″ x $\frac{3}{8}$″ Z bars spaced one to each frame, each beam to be attached to its frame by 5/16″ gusset.

Gunwales to be not less than 4½″ x 4½″ x 7/16″ angle running inside the side plating and below the deck.

The hull plating should be 21-pound on the bottom; bilges should be 21-pound; the side plating may be of 18-pound plate and in not more than 2 streaks.

The deck should have a checkered stringer streak on each side 30″ wide and about 7/16″ thick; remaining deck may be of 15-pound plating.

All plating to be worked "in" and "out" on longitudinal streaks; longitudinal laps to be double-riveted. All girth seams to be double-riveted to butt straps.

There should be a nosing or fender streak of 8″ x 8″ yellow pine, supported by 4″ x 4″ x $\frac{3}{8}$″ angles top and bottom. This nosing should extend entirely about the barge. On each side of the full length there should be a second fender streak of the same section about 3′ below the deck.

HATCHES.

There should be a hatch 18″ in diameter opening into each compartment of the hull, each hatch to be fitted with cast-iron cover made flush with the deck, water-tight, and with means of bolting it down. Iron ladder 18″ wide should be provided for each hatch.

BITTS AND CHOCKS.

There should be 4 heavy cast-iron towing bitts secured with 1″ bolts, 1 heavy cast-iron kevil amidships on each side, and 6 open shocks secured with 1″ bolts.

27 PAINTING.

The ironwork must be thoroughly freed from scale, rust, grease, or dirt and be painted with 3 coats of approved paint, the last two coats to be applied after assembling and riveting up.

A steam-driven bilge pump should be supplied with each barge, with suction pipes running to each compartment; the pump will be supplied with steam from other boats.

CHARTS

TOO

LARGE

FOR

FILMING

CHARTS

TOO LARGE FOR FILMING

Will commence delivery of barges within days and complete same within days after receipt of notice of award.

(Here follow drawings marked pp. 27[a] and 27[b].)

28 II. TRAVERSE.—*Filed April 2, 1908.*

In the Court of Claims of the United States, December term, A. D. 1908.

ELLICOTT MACHINE CO.
vs.
THE UNITED STATES. } No. 29907.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

29 III. ARGUMENT AND SUBMISSION OF CASE.

On the 2d day of April, 1908, this case came on to be heard, and was argued by Mr. James Piper and Mr. A. A. Hoehling, jr., for the claimants, and by Mr. S. S. Ashbaugh for the defendants, and submitted.

30 IV. FINDINGS OF FACT (AS AMENDED) AND CONCLUSION OF LAW, AND OPINION OF THE COURT.—*Filed as of May 18, 1908.*

CHARLES E. ELLICOTT AND JOHN B. NORRIS, Copartners, trading as Ellicott Machine Company.
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

Charles E. Ellicott and John B. Norris, are copartners, trading as Ellicott Machine Company, and are citizens of the United States, residents of the State of Maryland, and doing business in the city of Baltimore.

II.

In the month of April, 1906, the Isthmian Canal Commission issued a circular letter and advertisement asking for proposals for the construction and delivery of six steel dump barges; but one bid was received thereunder, which was rejected, and a new circular letter and

advertisement was issued asking for proposals, upon which two proposals were received and both laid aside, and new proposals were again asked for under a new advertisement, circular letter, and specifications, all of which are set forth in the petition.

III.

In answer to said advertisement various bids for the construction of said six steel barges were filed with the commission, and on June 8, 1906, the same were opened in accordance with the announcement, and were as follows:

William Cramp & Sons, Philadelphia	each	$31,500
Ellicott Machine Company, Baltimore, Md	do	16,900
Fore River Ship and Engine Building Company, Quincy, Mass	do	50,000
Maryland Steel Company, Sparrows Point, Md	do	27,950
T. S. Marvel Ship Building Company, Newburgh, N. Y	do	26,000
Motley, Green & Co., New York:		
Colon		22,750
Liverpool (knocked down)		20,750
Newport News Ship Building Company, Newport News, Va	for the lot	149,000
William E. Winant, Brooklyn, N. Y	do	111,000

31 IV.

The proposal and bid of the claimants of $16,900 for each of said six barges, which was the lowest, was as follows:

ELLICOTT MACHINE COMPANY,
OFFICES AND SHOPS, BUSH AND SEVERN STREETS,
Baltimore, Md., June 7, 1906.

SCHEDULE.

Six steel dump barges erected and delivered free of all charges at Baltimore, Maryland, subject to specifications of circular 310–C with such modifications as are shown on drawing #2105, dated June 7th submitted herewith, each sixteen thousand nine hundred dollars ($16,900). Total, one hundred one thousand four hundred dollars ($101,400.00).

Time of delivery.—For the completion of the entire contract two hundred and seventy (270) days.

Payments.—Partial payments will be made monthly for the barges and parts during construction. From each partial payment ten (10) per cent will be retained until the delivery of each of the barges and parts, when the retained percentage will be paid to the contractor.

Insurance.—It is agreed that preceding each partial payment the contractor is to have the barges and their parts insured against fire and marine risk at his own cost for and in behalf of the United States, in the name of the officer who makes the contract for their construction to an amount at least equal to the amount of said partial payment, and is thereafter to keep the said property so insured to at

least the full aggregate of the payments made upon it by the United States until delivery.

PROPOSALS FOR SIX STEEL DUMP BARGES.

(Place) BALTIMORE, MARYLAND.
(Date) *June 7th, 1906.*

To the General Purchasing Officer,
Isthmian Canal Commission, Washington, D. C.

SIR: In accordance with your advertisement and specifications dated May 29th, 1906, inviting proposals for six steel dump barges and subject to all the conditions and requirements thereof, copies of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we propose to furnish and deliver at Baltimore, Maryland, the articles specified in the foregoing "Schedule" at the price set opposite each.

We make this proposal with a full knowledge of the kind, quantity, and quality of the articles required, and should we receive written notice of the acceptance of all, or any part thereof, we will furnish the articles specified at the prices and at the place, and in the manner, and within the time indicated in this proposal; and will, if required by the Isthmian Canal Commission, by its proper officer, enter into formal contract within the time indicated in this proposal and the instructions contained hereon, with good and sufficient sureties,
32 to be approved by the Isthmian Canal Commission, for the faithful performance thereof. If no formal contract is required, the attached bond shall be effective as a guaranty for the faithful execution of any orders placed with us under this proposal.

(Signature) ————————.
(Street and number) ————————.
(Post-office) ————————.
(State and county) ————————.

V.

On July 27, 1906, in response to a letter of F. B. Maltby, division engineer, dated June 26, 1906, describing certain amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers, claimant addressed a letter to said division engineer transmitting a blueprint, No. 2105, which specified the details called for in said letter and showing the displacement and net weight, including equipment of the barge to be furnished.

Said letters of June 26 and July 27, 1903, and drawing No. 2105 are set forth in the petition.

VI.

On August 17, 1906, a contract under date of July 12, 1906, was signed by John B. Norris, representing the claimant, for the construction and delivery of said barges in accordance with the specifications contained in circular letter 310–C, dated May 29, 1906, with

such modifications as are shown on drawing No. 2105, dated June 7, 1906, and revised July 27, 1906, outlined in letter of Ellicott Machine Company, dated July 27, 1906, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26, 1906, with accompanying sketch, was signed by T. P. Shonts, August 28, 1906, acting on behalf of the United States.

Said contract, specifications, drawing, and letters are fully set forth in the petition.

VII.

On August 30, 1906, claimant presented to Turman M. Post, government inspector of dredges, its bill of materials intended to be used by them in the construction of said barges, but upon examination of said list of materials it was found by said inspector of dredges that the barges which the claimants proposed to construct were different from those described in circular letter and specifications 310-C, set forth in the petition, the principal component parts or members being reduced in weight, size, and power of resistance, and thereupon the same was disapproved by the officers of the Government. The list of materials so submitted for the approval of the inspector of the Government was in conformity with said specification 310-C, as modified by the parties as set forth in article 1 of said contract. That is to say, the materials so submitted in conformity with said specifications were subsequently reduced in both weight and strength to conform to the barges proposed to be constructed by claimants.

33

VIII.

Claimants at all times have held themselves in readiness and willing to comply with said contract dated July 12, 1906, in accordance with specifications contained in circular 310-C, with such modifications as are shown on the drawing No. 2105, dated June 7, 1906, and revised July 27, 1906, but have been prevented from so doing by the defendants, who insisted that said barges be erected strictly in accordance with the detailed specifications contained in circular 310-C and thereafter awarded the contract for the construction of said six steel barges to the Newport News Shipbuilding Company.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are entitled to recover judgment in the sum of ten thousand dollars ($10,000).

OPINION.

ATKINSON, J., delivered the opinion of the court:

This suit is based upon a written contract between claimants and the United States, wherein claimants agreed to build six steel dump barges for the sum of $101,400. The contract is dated July 12, 1906,

was signed and executed by claimants August 17, 1906, and by Theodore P. Shonts, chairman of the Isthmian Canal Commission, August 28, 1906. The contract provides for the construction of six steel dump barges in accordance with specifications in circular 310–C of the Isthmian Canal Commission, dated May 29, 1906, with such modifications as are shown on drawing No. 2105, dated June 7, 1906, and revised July 27, 1906, outlined by letter of plaintiffs of July 27, 1906, subject to such amendments as provided by correspondence between the parties in interest, all of which are made a part of the contract. It further provides for the inspection of the barges by agents of the defendants, and also for the payment of liquidated damages at the rate of $15 per day for failure to construct and deliver all of the barges to defendants on or before May 5, 1907, at a point to be designated by them. The specifications contained in circular No. 310–C provide the manner in which proposals for the construction of the barges shall be made, their size, weight, capacity, guaranty for faithful performance of the requirements of the contract, inspection, time of delivery, etc. The letter of claimants of July 27, 1906, together with a blueprint, No. 2105, which contains measurements, weights, etc., of the barges, explanatory of claimants' bid for the construction of the same, are all set forth in the petition.

The litigation in this case resulted from what seems to have been an apparent misunderstanding by the agents of the defendants, as to certain changes in the terms of an original advertisement for bids for the construction of the said six steel dump barges of a specified size, strength, and weight, to be used by the defendants in the construction of the Isthmian Canal, claimants having agreed to construct said barges under the specifications contained in the original advertisement for the sum of $148,400; but said bid, with all others, was
34 rejected for the reason that they were believed by the agents of the defendants to be excessive. Under a subsequent advertisement for bids claimants submitted another offer to construct the six dump barges of the same dimensions, but of lighter material and weight, for the sum of $101,400, which latter bid was accepted by defendants, though it is claimed by them that it was done through a misconception and a misunderstanding of the terms of the bid, and a contract thereunder was duly made and signed by claimants and the agents and representatives of the defendants. After the execution of the contract, defendants made an examination of the materials to be used by claimants, as set out by them in their proposal and bid, and found that they were different in size and weight from those described in their circular letter and specifications 310-C, the principal component parts or members having been reduced in strength as well as in weight, durability, size, and power of resistance, and thereupon the same were disapproved and rejected by the engineer officers of the defendants. Demand was thereupon made that claimants should adhere to the original specifications, which they refused to do, and as a result of such refusal the defendants abrogated their contract, gave

the construction of the said six barges to the Newport News Shipbuilding Company, for the sum of $149,000; and for the failure of defendants to comply with the provisions of the contract duly made and executed by them, claimants bring this suit to recover damages for breach of contract, in the sum of $30,000, they having tendered performance, and claim that they have been at all times ready, willing, and able to execute the work in accordance with the provisions of the contract.

It is argued on behalf of the claimants that the contract is clear and unambiguous in terms, and that the same rules must be applied as to reciprocal rights and obligations (subject only to certain limitations in respect of agents exceeding their authority) between the United States and an individual, in respect of contracts between them, as are applied to contracts between individual citizens. In other words, the United States must stand upon the same footing as an individual, and therefore they can not arbitrarily annul formally executed contracts. (Smoot *v.* United States, 15 Wall., 36; Chicago and N. W. Ry. *v.* United States, 104 U. S., 680.)

It was known to claimants that defendants desired six steel barges at a cost not to exceed $90,000; that the lowest bid offered under the first advertisement was $148,400, which was claimants' own bid, and which bid was rejected, because it was believed to be excessive. Claimants thereupon submitted a proposition to construct barges of the same dimensions, but of lighter weight and material, as the findings and the contract show, for $101,400. At the opening of the proposals, June 8, 1906, when claimants' bid, which was the lowest, was accepted, the bids were $101,400, $111,000, $149,000, $136,500, $156,000, $177,400, $189,000, and $200,000. The very fact of this great difference in the amounts of the bids, taken in connection with claimants' former bid of $148,400, it seems to us, was sufficient in itself to have put the defendants on inquiry. Attention was called to this fact by claimants in their letter of July 27, 1906 (Finding IV), to the defendants' division engineer, wherein attention was called to the weight of the barges proposed by the bid of a Brooklyn, N. Y., firm for $111,000, as compared with the weight of the barges which
35 claimants proposed to build, which letter of claimants revealed the fact that the two firms were evidently bidding on a different character of barges. The attention of defendants was further called to this same fact by a conspicuous note on a large blueprint prepared by claimants, which is attached to and is made a part of the contract, which note gives the net weight of the barges, and this weight was to be distributed in such manner as the defendants might direct. It is apparent, therefore, if the printed specifications are to govern, the letter of July 27, supra, and the blueprint No. 2105, will have to be entirely ignored. The wording of Article 1 of the contract, we think, disposes of this conflict. It provides that the six steel dump barges are to be constructed " in accordance with specifications contained in circular 310 C of the Isthmian Canal Commission, dated May 29, 1906, with such modifications as are shown on drawing No.

2105, dated June 7, 1906, and revised July 27, 1906, outlined in letter of Ellicott Machine Company, dated July 27, 1906 * * * copy of which specifications, drawing, letters, and sketch are attached hereto and form part of this contract."

When a contract is duly signed prior negotiations become merged in it, and to ascertain the intention of the parties thereto we must look to the contract alone. If the parties to a contract have reduced it to writing, they must intend such writing to be the repository of their common intentions. It merges all prior and contemporaneous negotiations. Extrinsic evidence is inadmissible in an action on a written contract to show the understanding of the meaning and effect of such contract entertained by one or both of the parties thereto when the contract was entered into. (Page on Contracts, §§ 86, 1189, 1193.)

If a party to a contract is able to but does not read it, then he is negligent, and can not plead this negligence in his defense. "Some courts lay it down as a broad principle that one who enters into a contract under mistake of fact due to his own negligence, concerning which he could with reasonable diligence have learned the truth, can not have relief. (Page on Contracts, § 80.) "A mistake as to a matter of fact to warrant relief in equity must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved." (Kerr on Mistake and Fraud, 408; Grymes *v.* Sanders, 93 U. S., 55; Barker *v.* Ry., 65 Fed., 460; Northern Assurance Co. *v.* G. V. Building Assn., 183 U. S., 308.)

Page on Contracts, section 79, further says:

"Every sane person is held to intend the legal consequences of his voluntary acts. Accordingly, if a person of legal capacity and not acting under fraud, misrepresentation, duress, or undue influence goes through the outward form of binding himself by contract, he can not avoid liability thereon by claiming that unknown to the adversary party he made his offer or acceptance under mistake of fact, and that he did not intend to make such offer. A mistake of this kind (i. e., mistake as to the subject-matter of the contract) is generally inoperative, because parties are bound by what they say
and do, and the courts will not consider what they think and
36 believe, in the event of a difference between the two. If an
article bought does not possess the qualities attributed to it by the purchaser the case is governed by the maxim caveat emptor, unless the seller has caused the mistake by his fraud or unless there has been a warranty."

Does the case at bar come within the cases cited? We hold that it does. The findings fail to reveal misrepresentation and fraud by claimants, but reveal a degree of negligence on the part of the agents of the defendants from which they can not be allowed to extricate themselves by the abrogation of a duly executed contract in order to shield themselves from responsibility.

In consideration of all of the facts in the case, and in view of the difference between the cost of doing certain work and what claimants were to receive for it, making reasonable deduction of the less time engaged and release from the care, cost, risk, and responsibility attending a full execution of the contract, the court decides that claimants are entitled to recover as profits the sum of $10,000, and accordingly judgment against the defendants for said amount is hereby ordered.

BY THE COURT.

Howry, J., was not present when this case was tried and took no part in the decision.

37 V. JUDGMENT OF THE COURT.

At a Court of Claims held in the city of Washington on the 18th day of May, 1908, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said Charles E. Ellicott and John B. Norris, copartners, trading as Ellicott Machine Company, claimant, do have and recover of and from the United States the sum of ten thousand dollars ($10,000.00).

BY THE COURT.

38 VI. ARGUMENT AND SUBMISSION OF DEFENDANTS' MOTION FOR NEW TRIAL AND ORDER THEREON.

On the 23d day of November, 1908, the defendants' motion for a new trial, filed August 10, 1908, was argued by Mr. S. S. Ashbaugh for the defendants in support of said motion, and by Mr. James Piper, attorney for claimant, opposed, and the motion was submitted.

On the 4th day of January, 1909, the court filed the following order:

Overruled.

STANTON J. PEELLE,
Chief Justice.

Mr. Justice Atkinson filed an opinion in support of said order.

39 Court of Claims of the United States.

(Decided January 4, 1909.)

CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, trading as Ellicott Machine Company,
v.
THE UNITED STATES. } No. 29907.

ATKINSON, J., delivered the opinion of the court.

The defendants file a motion herein for a new trial on the grounds that the findings and judgment of the court are contrary to the law and the evidence.

While it is true, as argued at bar, that there was a material difference between the claimants' first bid for the construction of the six barges for the Isthmian Canal Commission (under the Government's advertising circular, No. 310–C, which specified the size and strength of the barges desired by said commission), yet it was so specifically and clearly stated by the claimant in its second bid for the construction of the desired barges, the strength, weight, and measurement of the same being in detail specifically set forth, all which being agreed upon as shown by the contract, that we can not see any means of escape for the defendants upon either the law or the facts involved.

The Government's proposal in its specifications was for the construction of six steel dump barges. The bid of the claimant was for six steel dump barges. The specifications suggested that the barges should be of a certain length, beam, and draft. The bid of the claimant proposed to construct barges of the same length, beam, and draft. The specifications called for a certain carrying capacity. The bid covered specifically these requirements. The specifications required the rake, hoppers, with water-tight bulkheads, inclination of hoppers, method of bolting same, etc. The bid proposed the construction of barges meeting all of these requirements. In short, the only difference in the barges which the claimant proposed in its contract to construct under its bid was a difference in weight of framing and plates from those contained in the advertisement of the defendants' circular No. 310–C.

It is elementary that there must be a meeting of minds of the contracting parties in order to make a contract valid and binding. The decisions of the courts and all text-book writers agree on this proposition. It is argued, however, by counsel for the United States that in the case at bar there was not and could not have been a meeting of minds of the contracting parties when the contract involved herein was prepared and signed. The best evidence of the meaning and intent of a contract is the contract itself. If the language used by the contracting parties is plain and unambiguous, and there is no proof of concealment or fraud, there can be no need of the intervention of a court to pass upon such contract or to construe its meaning.

The law relating to a mistake and as to the nature and qualities of the subject-matter of a contract is also well settled. When a formal contract has been entered into, in order to void the same on the ground of mistake, the mistake must be mutual. The fact that the mistake, if any, in the present contract is not mutual seems to have been overlooked by defendants' counsel in the citation of authorities, as practically all of the authorities quoted in his brief relate to a mutual mistake as to the existence or quality of the subject contracted for. The other authorities quoted relate to a rescission of a contract or its cancellation in a court of equity or to the requirement of good faith on the part of a party where specific performance is sought. These authorities, as we construe them, do not govern the case at bar, which is a suit for damages for breach of a contract valid on its face.

But even if it be claimed that a mistake entitling the defendants to a rescission, it must be a mutual mistake or must have been induced by the fraud or misrepresentation of the claimant; and where it was not induced by fraud the court should place the parties in statu quo. In the cases cited there is no intimation that the mistakes resulted from the negligence of one of the parties to the contract. It seems clear, therefore, that the mistake as to the nature, quality, or existence of the subject-matter must be mutual in order to say that there was no "meeting of the minds" and, therefore, no contract.

As stated in our former opinion, where two or more parties enter into a contract they are mutually bound by the terms thereof, although the understanding of one of them may differ from the other as to the intent and meaning of the same (Baines *v.* Woodfall, 6 C. B. N. S., 637; Miller *v.* Lord, 11 Pick. (Mass.), 11). Also see Page on Contracts and the collation of authorities in 7 Amer. & Eng. Enc. of Law, p. 117, et seq.; Hardy *v.* United States, 9 C. Cls. R., 244; Brawley *v.* United States, 96 U. S. R., 168; Foster, Fed. Pr., p. 1050.

Inasmuch as no additional evidence has been offered since the trial and disposition of this case bearing upon the lack of knowledge of the contracting parties as to the full meaning, intent, and purpose of said parties, and no evidence of concealment, deception, or fraud on the part of the claimant is presented in favor of the motion before us, we can see no reason why the motion should be sustained.

Nor do we agree, as contended, that there was a substitution of different strength and material for those provided in the specifications of the defendants as to the manner of constructing the barges. On the contrary, it would be rather a modification thereof. It is admitted that the defendants desired barges of a certain weight and strength, but when it was learned that they could not be manufactured for anything like the price expected by the agents of the defendants the claimant tendered a bid to construct barges of the same dimensions but of less strength and weight, which bid was accepted and a contract was drawn thereunder and was duly signed and executed by the parties thereto. It is true there was no advertisement for bids under the reduced weight and strength of
41 material to be used in claimants' contract, still it seems unreasonable to us for defendants to insist that no modifications can be made by the parties to a contract in the details of the specifications submitted. Indeed, to make modifications of this kind is the rule rather than the exception. The purpose of an advertisement is to stimulate competition and to prevent favoritism. These barges, as a matter of fact, were advertised for three times, covering a continuous period of forty-two days; hence it can not be claimed that it was not known among competitors that the United States desired to purchase six steel dump barges for use on the Isthmian Canal.

Considering again the whole case, no satisfactory reason having been offered, and no authorities cited as controlling, we reaffirm our former opinion in this case. Accordingly the motion for a new trial is overruled.

Howry and Barney, JJ., did not hear this case tried and took no part in the decision.

Filed January 4, 1909.

42 VII. ARGUMENT AND SUBMISSION OF DEFENDANTS' MOTION TO AMEND FINDINGS OF FACT AND ORDER THEREON.

On the 8th day of February, 1909, the motion of the defendants, filed January 21, 1909, to amend the findings of fact, was argued by Mr. S. S. Ashbaugh in favor of said motion, and Mr. James Piper and Mr. A. A. Hoehling, jr., apposed, and submitted.

On February 15, 1909, the court filed the following order thereon:

Overruled in part and allowed in part as to Finding VII.

BY THE COURT.
STANTON J. PEELLE,
Chief Justice.

43 VIII. APPLICATION OF DEFENDANTS FOR, AND ALLOWANCE OF, APPEAL.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, trading as Ellicott Machine Co.,
vs.
THE UNITED STATES. } No. 29907.

From the judgment rendered in the above-entitled cause on the 4th day of January, 1909, in favor of claimant, the defendants, by their Attorney-General, on the 25th day of February, 1909, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,
Assistant Attorney-General.

Filed February 25, 1909.

Ordered that the above application for appeal be allowed as prayed for. June 10, 1909.

BY THE COURT.

44 In the Court of Claims.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, COPARTNERS, trading as Ellicott Machine Company,
vs.
THE UNITED STATES. } No. 29907.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in said cause; of the findings of fact and conclusion of law and opinion of the court; of the judgment of the court; of the argument and submission of the motions of defendants for new trial and for amendment of findings

of fact, and the orders of the court thereon; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 7 day of July 1909.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 21747. Court of Claims. Term No. 521. The United States, appellant, *vs.* Charles E. Ellicott and John B. Norris, copartners, trading as Ellicott Machine Company. Filed July 8, 1909. File No. 21747.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, APPELLANT,
v.
CHARLES E. ELLICOTT AND JOHN B. NORRIS, copartners, trading as Ellicott Machine Company, appellee. } No. 521.

APPEAL FROM THE COURT OF CLAIMS.

MOTION FOR ADDITIONAL FINDINGS OF FACT.

The Solicitor-General, in behalf of the United States, moves the court to remand the above-entitled cause to the Court of Claims of the United States with instructions to find and certify to this court, as matters of fact, in addition to the facts found and certified in the record now before the court—

> First. Whether or not the officers of the Isthmian Canal Commission knew before or at the time of the execution of the writing sued on in this case that the Ellicott Machine Company, appellee, did not propose or intend to construct barges of materials of the size and weight prescribed in the specifications contained in Circular No. 310–C of said commission,

inviting proposals for the construction of said barges, and attached to and made a part of said writing;

Second. The difference between the weight of the barges proposed to be constructed by appellee, that is, 260,000 pounds each, and the estimated weight of barges of like dimensions built with materials of the weight and size specified in said Circular No. 310–C;

Third. In detail, the differences in weight or size (as may be the proper basis for comparison upon the evidence in the record) between the different sorts of structural materials prescribed in said Circular No. 310–C and the materials to be used for like purposes, respectively, which were described in the list of materials submitted by appellee to Turman M. Post, government inspector of dredges, and referred to in Finding No. VII;

And to return said record with said additional findings of fact to this court with all convenient speed.

In support of said motion the Solicitor-General submits herewith the affidavit of S. S. Ashbaugh, showing that findings on said points were duly asked for in the Court of Claims, that the evidence in the record in said Court of Claims upon which such additional findings of fact must be based is undisputed and sufficient to enable said Court of Claims to promptly and specifically find the same; together with a brief as to the propriety of this motion and the necessity for said additional findings.

LLOYD W. BOWERS,
Solicitor-General.

DISTRICT OF COLUMBIA, *ss:*

S. S. Ashbaugh, being first duly sworn, says that he acted as attorney for the United States at the trial of the above-entitled cause in the Court of Claims of the United States, and is familiar with the record and proceedings in said cause in said court; that in said record and proceedings it appears by the testimony of Theodore P. Shonts, who was formerly Chairman of the Isthmian Canal Commission and who executed the instrument sued on in behalf of said Commission, and from the evidence of Frank B. Maltby, formerly principal assistant engineer of the Isthmian Canal Commission, who was the officer in immediate charge of the preparation of the specifications and the examination of the proposals for the construction of the barges referred to in said instrument, that neither of said officers knew before or at the time of the execution of said instrument that the barges proposed to be constructed by said appellee could not be built of materials of the size and weight specified without exceeding in weight 260,000 pounds; that it also appears from the testimony of John B. Norris and C. E. Ellicott, the members of appellee firm, that the barges proposed to be constructed by appellee were not intended by it to be of substantially the weight and strength specified, but were intended to be and were in fact radically different in strength and weight; that said Ellicott estimated that a barge of the dimensions shown on the plan submitted by appellee would weigh not less than 425,000 pounds if constructed of materials such

as were specified in said Circular No. 310–C, and that other witnesses estimated the minimum weight of such a barge at as high as 450,000 pounds, but none at less than 425,000 pounds; that Turman M. Post, the government inspector of dredges referred to in Finding No. VII of the Court of Claims, testified in detail as to the differences between the weight or size (as the case might be) of the materials specified in Circular 310–C aforesaid and those shown on the bill of materials submitted by appellee to him, showing such differences to have been as follows:

Item.	Government specification.	Claimant's bid.	Per cent of reduction.
Bottom plating	21 lb.	10.2 lb.	51
Side plating	18 lb.	10.2 lb.	43
Side plating of hoppers	21 lb.	10.2 lb.	51
End plating of hoppers	21 lb.	10.2 lb.	51
Deck-beam gussets	$\frac{5}{16}$	10.2 lb.	19
Deck plating	15 lb.	10.2 lb.	32
Floor beams at ends	10 in.	8 in.	20
Deck beams	$5\times\frac{3}{8}$	$2\frac{1}{16}\times3\times\frac{1}{4}$	51
Hopper supports	$4\times5\times\frac{3}{8}$	$3\frac{1}{2}\times2\frac{1}{2}\times\frac{5}{16}$	44
Bulkhead stiffener	$3\times3\times\frac{5}{16}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{3}{16}$	54
Bulkhead stiffener at ends of hoppers.	$4\times4\times\frac{3}{8}$	$3\times3\times\frac{1}{4}$	50
Rake stanchions	$3\times3\times\frac{3}{8}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{1}{4}$	43
Bulkhead rim angles	$4\times4\times\frac{3}{8}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{1}{4}$	58
Truss-frame diagonals	$3\times3\times\frac{5}{16}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{1}{4}$	54
Truss-frame horizontals	$3\times3\times\frac{5}{16}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{1}{4}$	54
Gunwale	$4\frac{1}{2}\times4\frac{1}{2}\times\frac{7}{16}$	$3\frac{1}{2}\times3\times\frac{5}{16}$	41
Fender angles	$4\times4\times\frac{3}{8}$	$2\frac{1}{2}\times2\frac{1}{2}\times\frac{1}{4}$	58
Side frames	$5\times3\frac{1}{2}\times\frac{3}{8}$	$3\frac{1}{2}\times2\frac{1}{2}\times\frac{5}{16}$	41
Covering plate for gates	15 lb.	10.2 lb.	32
Timber lining of hoppers	4 in.	$2\frac{1}{2}$ in.	37
Net weight	450,000 lbs.	260,000 lbs.	45

That all of said evidence was undisputed and is to be found in the order above set out at pages 135–6, 117–18, 60, 82–3, and 129–30, of the record in said above-entitled cause in the Court of Claims, and that the defendant endeavored to obtain findings on

said points in said Court of Claims as appears from the copies of various motions hereto attached which were filed and constitute parts of the record of said case in said Court of Claims.

S. S. ASHBAUGH.

Subscribed and sworn to before me this 25th day of February, A. D. 1910.

[SEAL.]

J. H. MACKEY,
Notary Public, District of Columbia.

In the Court of Claims of the United States.

CHARLES E. ELLICOTT AND JOHN B. Norris, copartners, trading as Ellicott Machine Company,
v.
THE UNITED STATES.
No. 29907.

MOTION OF DEFENDANT FOR NEW TRIAL.

Comes now the defendant above named, by its Attorney-General, and moves the court to vacate and set aside certain findings of fact and conclusions of law, and the judgment heretofore entered in this case on May 18, 1908, and to make other findings of fact and conclusions of law for the following reasons, to wit:

First.

The court committed an error of fact in Finding VII, wherein the court says: "The list of materials so submitted for the approval of the inspector of the Government was in conformity with said Specification 310–C as modified by the parties as set forth in article 1 of said contract;" whereas in truth and in fact said sentence should read as follows: "The

list of materials so submitted for the approval of the inspector of the Government was not in conformity with said Specification 310–C, but was on a radically and materially different contract."

Second.

The court committed an error of fact in Finding VIII, wherein it is stated that the claimant was ready and willing to comply with the contract dated July 12, 1906, "in accordance with specifications contained in Circular 310–C with such modifications as are shown on drawing No. 2105 dated June 7, 1906, and revised July 27, 1906;" whereas in truth and in fact the two propositions mentioned in Circular 310–C and in the letter of July 27, 1906, are so radically and materially different that the fulfillment of the one could not be in accordance with the other.

Third.

The court committed an error of fact in not finding that the minds of the parties never met upon a single proposition, and that the pretended contract so signed on July 12, 1906, was void for total misunderstanding.

Fourth.

The court committed an error of law in holding that there was no misrepresentation or fraud in the proposition so presented by the claimants as a substitute for the proposition presented by the Government in Circular 310–C.

Fifth.

The court committed an error of law in the assessment of damages and in holding that if the officers and agents of the Government were even negligent in not fully reading and comprehending the proposition of the claimant submitted on July 27, 1906, the claimant could recover as profits upon a supposed contract in any sum whatever.

Sixth.

The court committed an error of law in not holding that even if the officers and agents of the Government were negligent in not fully reading and comprehending the claimant's proposition submitted on July 27, 1906, the claimant could recover any further sum than his actual loss and expenses incurred.

For the errors above enumerated the defendant requests the court to set aside the judgment heretofore rendered herein, to grant a new trial and to remand the case to the general docket for further argument.

Respectfully submitted.

JOHN Q. THOMPSON,
Assistant Attorney-General.

S. S. ASHBAUGH,
Assistant Attorney.

In the Court of Claims of the United States.

CHARLES E. ELLICOTT AND JOHN B. Norris, copartners, trading as the Ellicott Machine Company, claimants,

v.

THE UNITED STATES.

No. 29907.

MOTION TO AMEND FINDINGS OF FACT.

Come now the defendants above named, by their Attorney-General, and move the court to amend the findings of fact heretofore filed herein by making the following findings of fact in lieu of Findings VII and VIII heretofore made by the court:

VII.

On August 30, 1906, claimants presented to Truman M. Post, government inspector of dredges, their bill of materials intended to be used by them in the construction of said barges, but upon examination of said list of materials it was found by said inspector of dredges that the barges which the claimants proposed to construct were different from those described in circular letter and Specifications 310–C,

set forth in the petition, the principal component parts or members being reduced in weight and size 45 per cent, and in power of resistance, as shown in the evidence, as follows:

(Here follows the comparative statement of materials set out in the foregoing affidavit of S. S. Ashbaugh.)

VIII.

Claimants at all times have held themselves in readiness and willing to comply with said contract dated July 12, 1906, in accordance with the drawing No. 2105, dated June 7, 1906, and revised July 27, 1906, but have been prevented from so doing by the defendant, who insisted that said barges be erected strictly in accordance with the detailed specifications contained in Circular 310–C, and thereafter awarded the contract for the construction of said six steel barges to the Newport News Shipbuilding Company.

Respectfully submitted.

JOHN Q. THOMPSON,
Assistant Attorney-General.

S. S. ASHBAUGH,
Assistant Attorney.

In the Court of Claims of the United States.

CHARLES E. ELLICOTT AND JOHN B. Norris, copartners, trading as the Ellicott Machine Company,
v.
THE UNITED STATES.
No. 29907.

MOTION TO INCLUDE FORMER MOTION IN THE CERTIFIED RECORD.

Come now the defendants, by their Attorney-General, and move the court to include in the record to be certified to the Supreme Court of the United States on appeal herein the motion heretofore filed in this case and overruled on February 15, 1905, which said motion so overruled was to amend Findings VII and VIII heretofore made by the court and including the comparative tables of sizes and weights and percentages of reduction, as found on page 191 of the record as heretofore printed herein; which said motion should be so included in the record to be certified to the Supreme Court in order to give the Supreme Court a clear and correct understanding of the facts to be presented and in accordance with the provisions of Rule 1 in such cases made and provided.

JOHN Q. THOMPSON,
Assistant Attorney-General.

S. S. ASHBAUGH,
Assistant Attorney.

NOTICE OF SUBMISSION.

WASHINGTON, D. C., *February 26, 1910.*

To FRANCIS K. CAREY, JAMES PIPER, and A. A. HOEHLING, Jr., *Attorneys for Appellees:*

SIRS: You will please take notice that on Monday, the 7th day of March, 1910, a motion to remand the above-entitled cause to the Court of Claims, with directions to find additional facts, will be duly submitted to the Supreme Court of the United States for its decision, of which said motion and the affidavit in support of the same the foregoing are true copies.

Annexed hereto is a true copy of a brief in support of said motion.

Respectfully,

LLOYD W. BOWERS,
Solicitor-General.

Service of copy of the above-mentioned motion, affidavit, and brief, and notice of submission acknowledged this 26th day of February, 1910.

A. A. HOEHLING, JR.,
Attorney for Appellee.

BRIEF IN SUPPORT OF MOTION.

I.

As to the propriety of the motion.

The rules of this court provide that cases appealed from the Court of Claims shall be heard upon the following record and none other:

> 1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.
>
> 2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record.

When, however, the record thus made up fails to disclose some vital fact or facts, it is obvious that such defect must be remedied in order that this court may pass upon the case with proper knowledge of the facts. Accordingly, it was at an early day established in the case of *United States* v. *Adams* (9 Wall., 661), that in such a contingency the proper practice was to remand the case to the Court of Claims with direc-

tions to find such additional facts as were deemed necessary. There can be no doubt therefore as to the propriety, as a matter of practice, of a motion of this sort.

II.

As to the necessity for additional findings.

On this point little need be said. The present motion is submitted in company with a motion by appellee to dismiss or affirm and a brief in behalf of the Government opposing said motion. From that brief it appears that a finding upon the point first suggested in the present motion is essential to the proper construction of the writing sued on, while findings upon the other two suggested points are of vital importance in connection with the question whether or not the barges proposed to be constructed by appellees were so radically different from those specified in the advertisement for bids that a contract for their construction could not be deemed to have been made after competitive bidding. It is unnecessary to burden the court with a repetition of the argument on these points. It will be found under Divisions III, IV, and V of the stated brief.

It remains only to add that, as appears from the affidavit of Mr. Ashbaugh and the accompanying papers, the Government exhausted every effort to obtain findings on the stated points without success, although they are undisputed on the record.

LLOYD W. BOWERS,
Solicitor-General.

O

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 521.

THE UNITED STATES, APPELLANT,

versus

CHARLES E. ELLICOTT AND JOHN B. NORRIS, CO-PARTNERS, TRADING AS ELLICOTT MACHINE COMPANY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

MOTION TO DISMISS OR AFFIRM.

Come now Charles E. Ellicott and John B. Norris, co-partners, trading as Ellicott Machine Company, appellee, by their attorneys, and move the court to *dismiss* the appeal herein for want of jurisdiction, because the same was not applied for, taken and perfected within the time therefor allowed by law, as more fully set forth in the brief and argument hereto annexed.

And, in the event said appeal shall not be dismissed, appellee moves the court to *affirm* the judgment of the Court of Claims herein, upon the ground that, although the record

may show that this court has jurisdiction, it is manifest that the appeal was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

FRANCIS K. CAREY,
JAMES PIPER,
A. A. HOEHLING, JR.,
Attorneys for Appellee.

Notice of Submission.

WASHINGTON, D. C., *February* 5, 1910.

To the Attorney General of the United States.

SIR: You will please take notice that on Monday, the 28th day of February, 1910, motion to dismiss or affirm, of which the foregoing is a true copy, will be duly submitted to the Supreme Court of the United States for its decision thereon. Annexed hereto is a true copy of brief and argument in support of said motion.

Respectfully,

FRANCIS K. CAREY,
JAMES PIPER,
A. A. HOEHLING, JR.,
Attorneys for Appellee.

Service of copy of motion, brief and argument, and notice of submission acknowledged this 5th day of February, 1910.

LLOYD W. BOWERS,
Solicitor General.

BRIEF.

This case comes before this court upon motion made by appellee *to dismiss* the appeal taken by the United States upon the ground that it was not taken *within ninety days* after the rendition of judgment by the Court of Claims, for which reason it is contended that this court is without jurisdiction on appeal.

And, in the event said appeal be not dismissed, appellee moves the court *to affirm* the judgment of the Court of Claims, as provided by the rules and practice of this court.

Statement.

The appellee filed a suit in the Court of Claims on December 10, 1906, based upon a written contract dated July 12, 1906 (entered into August 17, 1906), with the United States for six steel dump barges for the Isthmian Canal Commission at the agreed-upon price of one hundred and one thousand four hundred dollars ($101,400) (R., 22-3).

The United States thereafter breached the contract, and the Court of Claims, upon trial had therein, entered judgment in favor of appellee and against the United States in the sum of ten thousand dollars ($10,000) (R., 22), and defendant has appealed to this court.

The Record.

In order that there may be a proper understanding of the motion to dismiss, based upon the question of jurisdiction on the grounds above referred to, it is both proper and important to have in mind the record of the several actions taken in the court below in respect to the entry of judgment and the appeal attempted to be taken by defendant. The following is the record of such several proceedings and actions:

December 10, 1906, the suit was filed in the Court of Claims (R., 1).

April 2, 1908, the cause was argued and submitted (R., 19).

May 18, 1908, final judgment was rendered by the Court of Claims and *entered* in favor of appellee and against the United States in the sum of ten thousand dollars ($10,000) (R., 26).

August 10, 1908, defendant filed motion for new trial (R., 26) (being eighty-four days after the date of the judgment).

November 23, 1908, said motion was argued and submitted (R., 26).

NOTE.—The new term of the Court of Claims began on December 7, 1908 (sec. 1052, R. S. U. S.).

January 4, 1909, the Court of Claims thus disposed of the motion for new trial: "Overruled" (R., 26).

January 21, 1909, defendant filed another motion *to amend* the findings of fact (R., 29).

February 8, 1909, said motion was argued and submitted (R., 29).

February 15, 1909, motion was overruled in part and allowed in part as to Finding VII (R., 29).

February 25, 1909, the United States made application for and gave notice of an appeal to the Supreme Court of the United States "from the judgment rendered in the above-entitled cause on the *fourth day of January, 1909*" (R., 29).

June 10, 1909, the appeal was allowed by the Court of Claims thus: "Ordered that the above application for appeal be allowed as prayed for" (R., 29).

The Motion to Dismiss.

From the foregoing statement it will appear that the final judgment in this case was entered by the Court of Claims on May 18, 1908; that on the eighty-fourth day thereafter the defendant filed a motion for a new trial; that the term at which said judgment was rendered and entered expired in December, and the succeeding and new term of the Court of Claims began on the first Monday in December, 1908 (sec. 1052, R. S. U. S.), and that on January 4, 1909, the Court of Claims overruled the motion for a new trial.

Instead of then filing an application for the allowance of an appeal from the final judgment that had been entered May 18, 1908, or doing so within the six days that then remained of the ninety days permitted by statute for the taking of such appeal (sec. 708, R. S. U. S.), it was not until February 25, 1909, that defendant filed formal application for the allowance of an appeal, and then, instead of applying for an appeal from *the judgment* in the case, it prayed an appeal from the judgment rendered by the Court of Claims on January 4, 1909, and the Court of Claims allowed the application for the appeal exactly in the form that it was prayed for.

There was no judgment of the Court of Claims dated January 4, 1909, since that was merely the *order* of the Court of Claims overruling the motion for a new trial, and, of course, an order overruling motion for a new trial is not appealable.

Thus it is that the record herein discloses, first, that an appeal in this case was not applied for by defendant within ninety days after the date of the judgment; and, second, that the appeal prayed for and allowed was *not* from the judgment that was entered in the case, but was merely from the order overruling the motion for a new trial.

In this connection, it is proper to particularly call atten-

tion to the fact that the order of the Court of Claims, passed January 4, 1909, overruling the defendant's motion for a new trial, did not in any way interfere with, change, or affect the original final judgment that had been entered in the case on May 18, 1908; nor did it undertake to re-enter or renew the judgment; the order of the court passing upon the motion for a new trial, as will be found in the record (R., 26), is found in the single word, "overruled."

The position of appellee in this case is that the final judgment was rendered and entered by the Court of Claims on May 18, 1908 (R., 26); that the application for an appeal should have been made by defendant within ninety days thereafter; that when defendant filed a motion for a new trial on the eighty-fourth day after the rendition and entry of judgment, it had the effect to *suspend* merely (and not to revive *de novo*), the furher running of said jurisdictional period of ninety days; and that when said motion was overruled, the United States had remaining six days within which to apply for the allowance of an appeal; and that having failed so to do within said period of six days, its right to the appeal was lost.

Attention has already been called to the fact that the record discloses that no appeal was prayed or allowed from the *final judgment* that was entered in this cause, namely, the judgment of May 18, 1908; and that the present appeal, which is taken from an *alleged* judgment of the Court of Claims of January 4, 1909, is, in fact, based upon a mere *order* of the Court of Claims of that date, overruling defendant's motion for a new trial.

It would seem to require no argument to establish that the only judgment from which appellant could properly appeal is the *final* judgment of the Court of Claims, and that no appeal will lie to this court from a mere order of the Court of Claims overruling the motion for a new trial; such order not being in the nature of a final judgment, and

its disposition resting entirely in the discretion of the trial court.

The law upon this subject is thoroughly settled and hardly needs citation of authority in its support.

In Kellogg *vs.* U. S. (19 Ct. Cls., 73), it was thus stated:

> "The denial for the motion of a new trial is not an interlocutory order, ruling, judgment, or decree within the meaning of the rules of the Supreme Court relating to appeals from the Court of Claims."

It may not be improper to here suggest to the court that the rules and practice of the Court of Claims in respect of motions for new trial, the entry of judgment, etc., provide a different procedure from that ordinarily obtaining under other jurisdictions, and also a different procedure from that obtaining under the common law practice. The usual practice in regard to motions for new trial is that the same are required to be filed within a short time, varying in different jurisdictions, from the rising of the court, on the day following, or within three or more days from the rendition of the verdict, etc.; pending the time for the filing as well as consideration and action upon which motion, no judgment is actually rendered or entered. In other words, ordinarily the motion for a new trial necessarily precedes (if made at all) the entry of judgment. The time within which an appeal must be taken, in respect of jurisdictions of the kind just mentioned, begins to run when the judgment is actually entered.

In the Court of Claims, however (rule 4, relating to appeals from the Court of Claims), it is provided that:

> "In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of fact and their conclusions of law thereon, in open court, *before or at the time they enter judgment in the case.*"

Further, rule 107, Court of Claims, provides that a motion for a new trial "must be made *at the term* in which the judgment is rendered."

Thus, in the present case, the Court of Claims rendered and actually entered its final judgment on May 18, 1908 (R., 26), and thereupon the time allowed for taking an appeal to this court, namely, ninety days, commenced to run, and that is the date for reckoning the time within which the appeal to this court must be governed.

Appellant could have filed at any time within ninety days thereafter an application for the allowance of an appeal, and such application would have temporarily *suspended* the further running of the time incident to the filing, consideration, and disposition of a motion for a new trial:

U. S. *vs.* Ayres (9 Wall., 609).

Roberts *vs.* U. S. (15 *Id.*, 384); rule 3, relating to appeals from the Court of Claims.

It is important to bear in mind the difference in respect of the practice obtaining in the Court of Claims and that obtaining in most other courts as to the relative order of motions for new trial and entry of judgment. Ordinarily, an appeal cannot properly be taken while a motion for a new trial is pending before the trial court; that being so because of the fact that, until such motion for new trial is disposed of, there would not ordinarily be any final judgment from which an appeal could be taken. As already explained, under the practice of the Court of Claims, it is permissible to file motions for new trial at any time *during the term* at which the judgment was entered. This court has heretofore ruled that so long as the application for an appeal from the judgment of the Court of Claims is *filed* within the statutory period of ninety days, it is immaterial whether it is thereafter actually *allowed* within or beyond said period of ninety days.

Thus it is, in practice, that not infrequently an application for the allowance of an appeal from a judgment will be filed along with a motion for a new trial, this for the purpose of having the application actually filed within the period of ninety days, and thereafter it is not formally presented for allowance by the court until the motion for a new trial is disposed of; nor is it material whether such application for appeal be filed prior or subsequent to the filing of the motion for a new trial, so long, of course, as the application for appeal is not actually *allowed* by the court until the motion for a new trial is disposed of.

As already remarked, defendant instead of applying for an appeal upon the overruling of the motion for a new trial on January 4, 1909 (R., 26), and within the time then remaining, waited a further period of some seventeen days and then filed another motion requesting certain amendments of findings of fact—this motion being filed in a different and succeeding *term* of the court from that at which the *final judgment* was entered. Such a motion was in effect a motion for a new trial and governed by the same rules (Neal *vs.* U. S., 14 Ct. Cls., 477, and Samson *vs.* U. S., 36 *Id.*, 194), and must be made at the same term at which the judgment was entered (Cambuston *vs.* U. S., 95 U. S., 287-8).

After the term of court during which final judgment was rendered had passed the court had no authority to alter, amend, or overrule its judgment, and could not consider any motions directed to it which had this end in view. Therefore, after the term had passed the judgment must stand, even though the court might have altered or amended the findings of fact. Of course, where a motion for new findings of fact or for a new trial is made within the term, the court may hand down its ruling thereon after the expiration of such terms and can in such ruling grant the new trial or amend the findings of facts as prayed. The court by granting a new trial could vacate its former judgment

or it could amend the findings of fact and re-enter the same judgment thereon, or it could amend the findings and let the judgment stand as and when originally given. But if the court fails to grant the new trial or make new findings, as requested, and overrules the motion therefor, as was done in this case, then the term having expired and the judgment having been rendered as a final judgment, and having been so entered up on the docket of the clerk upon order of the court, the judgment must be final and is not subject to any alteration by the court, but must stand as and when given as the final judgment in the suit. After the term has expired, the only right of the defeated litigant is to pursue his appeal to the higher court, provided, of course, that such appeal was duly and properly prayed for and granted. The Court of Claims, however, considered this second motion and added the last sentence to finding VII. This change was immaterial and in no way affected the previous judgment given by the court. The court having no authority to alter this judgment, did not attempt to touch it and did not order it re-entered or renewed either when the first motion was overruled or when the second motion was considered and acted upon.

When the first motion for a new trial and new findings of fact was overruled, the appellant's only remedy was through an appeal, and it is submitted that the Court of Claims was in error when it even considered the second motion made on January 21, 1909, for new findings. However, as the addition to finding VII was immaterial and as the original judgment was not changed or renewed or re-entered, the action of the court in considering this second motion has really no effect on the present controversy.

While it is true that decisions may be found containing the general statement that the pendency of a motion for a new trial, petition for a rehearing, and the like, will operate to *suspend* the running of the statutory period within

which an appeal may be taken, counsel have been unable to find any case where it has been held that such pendency of a motion for a new trial operates not merely to suspend the further running of time, but when overruled, *to revive de novo* the statutory period for appeal unless upon the overruling of such motion the court enters up a new judgment or re-enters the former judgment, in such sense that the action of the court at that time becomes the final judgment of the court for the purpose of review under proceedings in an appellate court.

As already remarked, the defendant in this case had ninety days within which to apply for an appeal from the final judgment of the Court of Claims that was entered May 18, 1908. On or about the eighty-fourth day thereafter it filed a motion for a new trial, the same being within the term at which the judgment was entered; that motion was argued at that term, but was not disposed of by the court until the next and succeeding term, January 4, 1909; and thereafter it would have been entirely proper for defendant to have filed its application for an appeal at any time within so much of the statutory period of ninety days as remained, giving due effect to the suspension of the further running of time occasioned by the pendency of the motion for a new trial from the eighty-fourth day, as above, to January 4, 1909.

It was not until February 25, 1909, long after the expiration of said period of ninety days, that defendant filed its application for appeal and then, too, as already remarked, it did not undertake to appeal from the final judgment, but only from the *order* overruling the motion for new trial.

If defendant's contention be correct, then it must of necessity result that defendant can wait until the statutory period of ninety days has almost expired, say eighty-nine days, for example (eighty-four days in this case), then file a motion for a new trial, which may be carried over to the

succeeding term; then when that is overruled, wait until a further period of almost ninety days has expired and file another motion (in this case the defendant waited for a period of seventeen days after the overruling of the motion for a new trial and then filed an equivalent motion), and so on successively, claiming that each successive action of this kind operates from time to time, when and as filed and disposed of, to absolutely revive *de novo* the statutory period of ninety days for the taking of an appeal.

The mere statement of the proposition would certainly seem to carry with it its own refutation, as it can hardly be deemed that it was ever intended to thus unduly prolong the right of appeal for the review of judgments of the Court of Claims.

The record in this case well illustrates the length to which a practice of that kind, if sanctioned, can be carried: Here the claimant, on December 10, 1906, applied to the Court of Claims for relief and redress in respect of the matters set forth in its petition; on May 18, 1908, the Court of Claims solemnly adjudged that claimant was entitled to recover from the United States the sum of ten thousand dollars ($10,000); that was followed by a succession of motions on the part of defendant, at long intervals, all of which resulted in a delay, from that date until February 25, 1909, and upwards of a year after the rendition of the judgment, before the defendant actually filed an application for an appeal, and it was not until June 10, 1909, more than a year after the judgment was rendered, that the application for the appeal was allowed.

To require an appellant to prosecute its rights within the statutory period in the manner hereinabove pointed out and as herein contended, would certainly impose no hardship upon the losing party; whereas, to support the contention made by defendant that, at its own pleasure, it may absolutely revive the entire statutory period of ninety days by

the filing of successive motions, is certainly contrary to the language of the statute and would impose a great wrong and an unnecessary hardship upon the rights of appellee, as so adjudicated by the court.

Motion to Affirm.

While, for the reasons hereinabove stated, it is respectfully submitted that the motion to dismiss this appeal should prevail, nevertheless, and in the event the court should decide herein that the appeal should not be dismissed, it is submitted that there is sufficient color and ground for the motion to dismiss, to authorize this court to entertain the motion to affirm the judgment below; and further, that the court is entitled to examine the record, and if it appears therefrom that the lower court was right on the merits, the judgment should be affirmed.

Whitney *vs.* Cook (99 U. S., 607);
Metcalf *vs.* The Alaska (130 *Id.*, 201);
R. R. Co. *vs.* Bristol (151 *Id.*, 555);
Douglas *vs.* Wallace (161 *Id.*, 347);
Ry. Co. *vs.* Carson (194 *Id.*, 136).

As was stated by this court in said case of Douglas *vs.* Wallace, *supra:*

> "While we are of the opinion that the claim of a Federal question thus presented is not so clearly frivolous as to authorize us to dismiss the case * * * we think there was such color for the motion to dismiss as authorizes us to proceed with the consideration of the questions involved.
>
> "Upon the merits we think the position assumed by the defendant is wholly untenable."

So, too, in the case of City of Chanute *vs.* Trader (132 U. S., 21[illegible]) the court cited with approval the case of Swope

vs. Leffingwell (105 U. S., 3), where it held that there was jurisdiction on appeal, but affirmed the judgment on the ground that "the case on the merits was governed by previous decisions."

So, too, in the case of S. C. Tryon (105 U. S., 267) the court overruled the motion to dismiss, but affirmed the decree on a consideration of the findings of fact.

It is submitted that a reading of the findings of fact set forth in the record in this case (R., 19-22) will disclose that there is no real or substantial question submitted for the review of this court.

The Court of Claims found that a valid contract existed between appellee and appellant; that the defendant (United States) breached the contract, and the court adjudged that, by reason of such breach, apellee was entitled to have and recover from the United States the sum of ten thousand dollars ($10,000).

It is a well settled doctrine of this court that the findings of fact of the Court of Claims are conclusive, and that the only question proper for review by this court is whether or not the conclusion of law thereon and the entry of judgment by the court in accordance therewith, is supported and justified by the facts as so found.

As already remarked, the court below has found a contract between the parties; has described its terms; has found that the defendant breached that contract; and it has made its finding as to the amount the appellee is entitled to recover from the United States.

Thus it would seem to necessarily follow that there is and can be no real or substantial question of law to be reviewed by this court.

The burden of the contention on the part of the defendant below was that the contract as entered into provided a barge of lighter construction than as specified in the original advertisement for bids; that is to say, a barge having the

same length, beam, draught, carrying capacity, form of construction, mechanism, etc., but being lighter in its framing and plates.

The record discloses that there were successive advertisements made by defendant for procuring these barges because of the fact that the bids were in greater amount than defendant desired to pay therefor. The present contract, under a bid which was satisfactory in price to defendant, was entered into, which, while not in any way departing from or changing the subject matter of the advertisement or specifications, provided for a barge lighter in framing and plates.

After the contract had been entered into and appellee had started the performance of its work thereunder, defendant apparently came to the conclusion that the barge contracted for would not be satisfactory, and so broke its contract and refused to permit performance by appellee.

The theory of defendant seems to be that the phraseology of the public advertisement for bids must be strictly and literally adhered to and followed, and that there can be no change or modification in any respect touching the details of the subject-matter of the advertisement and specifications, and that for this reason the barges contracted for were not the ones advertised for.

The advertisement simply called for proposals for furnishing and delivering six steel dump barges; hence no contention can be made by defendant that there was any departure in the contract from the subject-matter of the advertisement. The advertisement, in addition to describing the subject-matter, as just stated, required merely that "cuts and other descriptions of the barges offered should be submitted with bids" (R., 15-16). Attached to the advertisement were certain specifications which contained the statement that "a certain latitude in the details of construction will be permissible" (R., 16); and that "the following speci-

fications and requirements are general only as indicating the class of construction desired" (R., 16); and, furthermore, the specifications suggest what is "desired," not "required;" and "should" is used instead of "must" repeatedly throughout the specifications.

It would seem idle to contend that so long as the subject-matter of the advertisement and specifications be not departed from, there can be absolutely no modification or change in respect of mere detailed matters incident to such subject-matter.

> International Co. *vs.* U. S. (13 Ct. Cls., 209).
> McKee *vs.* U. S. (12 *Id.*, 504).

So, too, in the case of Garfield *vs.* U. S. (93 U. S., 242): The postoffice department had published a notice and advertisement inviting proposals for carrying United States mail between certain designated points; and the postmaster general accepted a bid covering an abridged distance. Subsequently, the bidder brought suit against the United States because of defendant's refusal to enter into formal contract with him, said suit being based on the theory that the proposal, bid, and acceptance constituted a valid contract. In that case it was objected that no valid contract had been entered into, among other reasons, because of a departure between the bid and the notice and advertisement—the bid and acceptance thereof being for an abridged distance, etc. This court held, however, that there was a valid contract; and, in speaking of the objection and contention urged by the United States, thus stated:

> "The object of the statute was to secure notice of the intended post-routes, of the service required, and the manner of its performance, that bidders might compete, that favoritism should be prevented, that efficiency and economy in the service should be obtained. It was not required that papers of this char-

> acter should be drawn, as if they were subject to the criticism or dissection of a demurrer in a court of law."

If the contention urged by defendant in the court below in this case were to be upheld, the result would certainly appear to be most harmful and injurious to the orderly conduct of the business of the United States, in that it would operate to absolutely prohibit and prevent the several departments of the Government from exercising any latitude whatever in respect of altering or changing mere matters of detail that enter into the subject-matter of advertisements and contracts entered into thereunder.

This matter was thoroughly considered in the court below, where the entire evidence was before the court and where it was able to intelligently comprehend and understand just how much force, if any, there was in the contention so urged on behalf of the defendant as to this matter of a change as well as the extent thereof in mere details of construction; and the court below decided that there was no merit in the contention, the opinion thus stating:

> "It seems unreasonable to us for defendants to insist that no modifications can be made by the parties to a contract in the details of the specifications submitted. Indeed, to make modifications of this kind is the rule rather than the excepuon. The purpose of an advertisement is to stimulate competition and to prevent favoritism. These barges, as a matter of fact, were advertised for three times, covering a continuous period of forty-two days; hence it cannot be claimed that it was not known among competitors that the United States desired to purchase six steel dump barges for use on the Isthmian Canal.
>
> "Considering again the whole case, no satisfactory reason having been offered, and no authorities cited as controlling, we reaffirm our former opinion in this case" (R., 28).

As was stated at the outset of this brief, in connection with the motion to affirm, it would seem to conclusively appear that the ultimate facts found by the court justify and sustain the conclusion of law of the Court of Claims and the judgment that it entered thereunder, and that there really is presented by this record no substantial question that can properly be reviewed by this court.

FRANCIS K. CAREY,
JAMES PIPER,
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Attorneys for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, APPELLANT,
v.
CHARLES E. ELLICOTT AND JOHN B. NORRIS, copartners, trading as Ellicott Machine Company. } No. 85.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

This case is pending here on a motion by appellees to dismiss the appeal or affirm the judgment of the Court of Claims, on a motion by the Government to remand the case to the Court of Claims for additional findings of facts, and on the merits.

That the appeal was taken in time is clearly demonstrated in the brief on file by the Government in opposition to the motion to dismiss; that the appeal is not without merit, and that the motion to remand the case to the Court of Claims for additional findings of facts should be sustained, will appear, we think, from a mere statement of the case.

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The case.

In April, 1906, the Isthmian Canal Commission was in need of six steel dump barges and advertised for proposals to furnish them. Only one bid was received, and so new proposals were called for, to be opened May 21, 1906. (R., 1.)

Two bids were now received, one for $35,000 for each barge, delivered at Panama, and the other by the appellees for $24,733.33 per barge, delivered at Baltimore. These bids were rejected. (R., 1.) What the specifications were upon which these bids were made is not shown by the record in this court. We think the fact should be found and reported by the Court of Claims.

A third time proposals were called for, to be opened June 8, 1906. This advertisement was accompanied by specifications which are contained in pages 16 to 19 of the printed record. Whether drawings accompanied these specifications is not clear, and the fact in this respect should be ascertained.

The specifications dealt with the dimensions of the barges, their carrying capacity, and draft and details of construction, and the materials to be used. The specifications are very precise as to the dimensions, and in some cases weight, of the steel plates, angle bars, bitts, etc., and timbers which are to enter into the construction of the barges.

Nothing is said of the weight of the completed barges except that they are to be "of heavy construction for rough service."

Bids were received as follows (R., 2):

Fore River Ship, etc., Co.	$50,000.00 each;
William Cramp & Sons	31,500.00 each;
Maryland Steel Co	27,950.00 each;
Marvel Shipbuilding Co	26,000.00 each;
Newport News, etc., Co	24,833.33 each;
Motley, Green & Co	22,750.00 each;
William E. Winant	18,500.00 each;
Ellicott Machine Co	16,900.00 each.

The bid of the appellees for $16,900 was for delivery at Baltimore and was for the barges according to the specifications, "with such modifications as are shown on drawing No. 2105, dated June 7th, submitted herewith." (R., 20.)

It was stated that "we make this proposal with a full knowledge of the kind, quantity, and quality of the articles required, and * * * we will furnish the articles specified at the prices and at the place, and in the manner, and within the time indicated in this proposal." (R., 21.)

The drawing 2105, of date June 7, 1906, upon which the proposal states the modifications are shown, is not contained in the record before this court, and manifestly it should be.

The petition states (R., 3):

> That said blue print No. 2105 so inclosed was exactly similar to blue print No. 2105, which was first filed with the bid of claimant June 7, 1906, except that said blue print inclosed with letter of July 27 contained the following words written on the face thereof:
>
> "SCHEDULE OF DISPLACEMENT, LOAD, AND DRAFT.
>
Capacity of bins, cu. yds	350
Displacement of hull as shown on 8'-0" draft line, 21,446 cu. ft., at 65 lbs. per cu. ft	1,394,000
350 cu. yds., total load, at 3,240 lbs. per cu. yd	1,134,000
Net weight of barge, including equipment	260,000 lbs."

But this is manifestly incorrect, as a reference to the drawing in the record, which will be found facing page 19, shows other notations which are in terms stated to be based on a letter of June 26, 1906. The only notation on the drawing which is undated, and may therefore have been on the drawing on June 7, is the following, which is found near the lower right-hand corner and above the number 2105, and is—

> **Note—**
> **Capacity of bins—350 cu. yards.**
> **Maximum loaded draft when carrying 350 cu. yds. of material weighing 3240 lbs. per cu. yard, not to exceed 8′–0″.**

It is important to know the terms of the proposal made by appellees, and these are not shown by the findings of the Court of Claims.

The notation quoted above on its face modifies the specifications only by fixing the capacity of the barges at 350 cubic yards. The specifications provided for "not less than 350 nor more than 400 cubic yards." (R. 16.) The draft was stated at 8 feet alike in the notation and specifications.

It is not apparent that the weight and dimensions of materials for the construction of the barge, as set forth in the specifications, are modified by the notation.

June 14, 1906, the Commission wrote to appellees, inclosing drafts of contracts to be signed. This was not answered until July 16, 1906. (R., 2, 3.)

June 26, 1906, the Commission's engineer, Mr. Maltby, wrote to Mr. Ross, the purchasing agent, as follows (R., 13, 14):

Mr. D. W. Ross,
General Purchasing Officer, I. C. C.,
Washington, D. C.

DEAR SIR: I am returning to you herewith, the papers received in connection with bids for dump barges. I send you a small sketch showing the desired arrangement of the hinges on the hopper doors, and the method of securing timber lining to hoppers.

It is noted that the drawing submitted by the Ellicott Machine Works does not show any details as required by the specifications. It is presumed, however, (and we should insist on it) that the framing will be in strict accordance with our specifications. Their drawings show three hoppers, each 20 ft. long, but a small sketch shows the chains attached to the doors at the centre of each hopper, as well as at the ends, and this should be done. Chains supporting the doors should be attached to them at least every ten feet. The arrangement for hoisting the doors should be such as will enable us to drop them readily, through the use of a clutch of some sort. This is a very ordinary method, and it is only mentioned so that there may be no misunderstanding about it.

The sketch which I enclose is suggestive only, and may be varied in detail as the manufacturer desires; the requirements only being that the hinge on the door should be heavy and thoroughly bolted to the door; that it should be placed in such a position that when the door is dropped it will not pinch on the sides of the opening; and furthermore, that they

will be secured by links to the fastenings on the sides of the hopper, above the light water line. The purpose of this arrangement is to enable us to pull up the doors, repair them and their hinges without docking the barge.

According to our specifications all of these details should have been furnished by the bidders with their proposal, and would have been approved or disapproved when accepting their bids. I am willing, however, to waive this point, provided they are willing to build these details in the way which it was intended to cover in the specifications.

Yours, very truly,

(Signed) F. B. MALTBY,
Division Engineer.

This letter was communicated to appellees, and indeed was made a part of the contract.

It is to be observed that this letter contains no suggestion of a radical or indeed any change in the weight of the barge or wide departure from the specifications, and on the other hand states as to the drawing that "it is noted that the drawing submitted by the Ellicott Machine Works does not show any details as required by the specifications. It is presumed, however (and we should insist on it), that the framing will be in strict accordance with our specifications."

On July 16, 1906, the appellees wrote to Ross, the purchasing agent, and as to this letter the record quotes and states as follows (R., 3):

"We have your favor of June 14th, 1906, with enclosures as noted. In order to correspond with our proposal of June 7th, 1906, Article I should read as follows:

"Article I. That the said Ellicott Machine Company shall construct, erect and deliver to the Isthmian Canal Commission, at Baltimore, Maryland, six steel dump barges in accordance with specifications contained in circular No. 310–C of the Isthmian Canal Commission, dated May 29th, 1906; with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and subject to such amendments as to details of hinges hoisting gear and method of securing timber lining to hoppers, as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with the accompanying sketch, a copy of which specifications, drawing, letter and sketch are attached herewith and form part of this contract."

Said letter further says that "our drawing No. 2105 was not intended to show working details, but solely to limit the conditions of displacements, load, and draft. As long as these are maintained we shall be pleased to follow such reasonable design of working details in arrangement and distribution of material as Mr. Maltby or his inspector may require." And the letter further says, "We return contracts."

There is in this letter no statement of the weight of the barge when completed and no suggestion that the specifications as to dimensions of material are

abrogated by the notation on the drawing of the loaded draft of the barges.

On July 27, 1906, the appellees wrote to Engineer Maltby as follows (R., 12, 13):

> F. B. MALTBY, *Division Engineer*,
> (Through D. W. Ross, General Purchasing Officer, Isthmian Canal Commission),
> *Washington, D. C.*
>
> DEAR SIR: In accordance with our verbal request of D. W. Ross, general purchasing officer, in connection with our bid June 7th we submit print #2105 revised July 27th, specifying details as called for in your letter June 26th, 1906, of hinges, hoisting gear and method of securing timber lining to hoppers.
>
> We have also inserted on the drawing a schedule of displacement, load and draft showing a total net weight for the barge of 260,000 pounds. You will note that this corresponds with the note shown on print originally submitted with bid, and this weight may be distributed in any way your representative may desire. It has been the custom on previous similar contracts, the total weights and general design being clearly specified and defined in the contract to get out the working details under the supervision of a representative of the contracting officer as soon as possible after the execution of contract.
>
> We shall be very glad if this contract can be awarded at once as the season is approaching in which such work cannot be advantageously prosecuted.

We take this opportunity to call your attention to the bid of the next lowest bidder, Winant of Brooklyn, N. Y.

A schedule of displacement on this bid will show as follows:

Displacement of hull as shown on maximum permissible draft line of 8′-0″—20,263 cu. ft. at 65 lbs.	1,317,095 lbs.
Deduct weight of minimum permissible load—350 cu. yds. at 3,240 lbs.	1,134,000 lbs.
Net weight of barge including equipment..	183,095 lbs.

From the above you will note that we are offering about 80,000 pounds more material on each barge than our competitor at about $1,000.00 less per barge.

Respectfully,

ELLICOTT MACHINE COMPANY.

This letter was attached to the contract, and pursuant to it the notation was made at the top of drawing No. 2105, as follows:

Revised July 27, 06.

Accompanying letter of Ellicott Machine Co. to F. B. Maltby July 27, 06.

Details of hinges, hoisting gear, and method of securing timber lining; to be constructed as described by letter of F. B. Maltby, Division Engineer, dated June 26, 06.

Schedule of Displacement

Load and Draft.

Capacity of bins, cu. yds.	**350**
Displacement of hull as shown on 8′-0″ draft line, 21446 cu. ft. at 65 lbs. per cu. ft.	**1,394,000**
350 cu. yds. total load—at 3240 lbs. per cu. yd.	**1,134,000**
Net weight of barge including equipment.	**260,000 lbs.**

The letter of July 27, 1906, states that the schedule of displacement, load and draft shows a total net

weight for the barge of 260,000 pounds, and "that this corresponds with the note shown on print originally submitted with bid;" but still no statement that the specifications as to dimensions of material have been abrogated.

This seems to have been the end of the correspondence leading up to the execution of the contract.

The contract itself is dated July 12, 1906 (R., 8), and was evidently framed in accordance with the suggestions of appellees' letter of July 16, 1906, for Article I of the contract follows almost literally the suggestions of that letter, saving the reference to the letter of July 27, 1906, as will appear by comparison.

Article I as suggested by appellees July 16, 1906 (R., 3):

> "That the said Ellicott Machine Company shall construct, erect and deliver to the Isthmian Canal Commission, at Baltimore, Maryland, six steel dump barges in accordance with specifications contained in circular No. 310–C of the Isthmian Canal Commission, dated May 29th, 1906; with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, and subject to such amendments as to details of hinges, hoisting gear and method of securing timber lining to hoppers, as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with the accompanying sketch, a copy of which specifications, drawing, letter and sketch are attached herewith and form part of this contract."

Article I as contained in contract (R., 8):

> Article 1. That the said Ellicott Machine Company shall construct, erect, and deliver to the Isthmian Canal Commission at Baltimore, Maryland, six (6) steel dump barges, in accordance with specifications contained in circular 310–C of the Isthmian Canal Commission, dated May 29th, 1906, with such modifications as are shown on drawing No. 2105, dated June 7th, 1906, *and revised July 27th, 1906, outlined in letter of Ellicott Machine Company dated July 27th, 1906*, and subject to such amendments as to details of hinges, hoisting gear, and method of securing timber lining to hoppers as are described by letter of F. B. Maltby, division engineer, dated June 26th, 1906, with accompanying sketch, copy of which specifications, drawings, letters, and sketch are attached hereto and form a part of this contract.

The specifications as to dimensions of material were, however, set forth in the contract in all their details as originally prescribed in the advertisement calling for bids.

The contract containing the specifications, the letter of Maltby to Ross of June 26, 1906, the letter of appellees to Maltby of July 27, 1906, and the drawing No. 2105, with the notations thereon, was on August 17, 1906, signed by the appellees, and on August 28, 1906, a draft duly signed was delivered by the Commission to the appellees.

Controversy over the meaning of the contract arose immediately.

On August 30, 1906, appellees prepared "an itemized list of materials covering the six barges and distributing the total weight of 260,000 pounds in the best possible manner," according to their judgment. This was sent to Ross, and at his request was on September 1 sent to T. M. Post, the Commission's inspector of dredges. Post wrote to appellees on September 8 that he had been directed to withhold approval of the bill of materials, and had forwarded it to Maltby, and on September 14, 1906, appellees were advised that Maltby had cabled: "Insist Ellicott follow our specifications as to framing and plates on barges." (R., 5.)

In answer to this appellees wrote to Ross September 15, 1906, that they were willing to return to the original specifications as to framing and plates, but that this would decrease the displacement to some extent, and consequently the carrying capacity of the barges, *otherwise the weight of the barges would exceed the total called for in the contract, namely, 260,000 pounds.* They further suggested that the specifications as to framing and plates could be carried out and at the same time the same capacity, as shown on drawing No. 2105, maintained if the cost of the additional material was covered by a supplementary contract. (R., 5.)

The Commission insisted upon observance of the specifications, and the appellees refusing compliance, the contract for the barges was awarded to another party.

The evidence before the Court of Claims showed that the difference between the parties was a radical one. The weight of a barge, if constructed according to specifications, was put by Mr. Ellicott himself at 425,000 pounds. No witness put it below this. Some estimates put it at 450,000 pounds. The difference in weight alone at the lowest estimate involved a reduction from the specifications of 38.8 per cent. This fact should have been found and reported by the Court of Claims.

Reference to page 4 of the motion for additional findings of facts will show what the difference signified as to details of construction. In 21 items of materials there was a reduction in weight in the bill of materials submitted by appellees from the call of the specifications of from 19 to 54 per cent. This fact was important, and should have been found and reported by the Court of Claims.

The Court of Claims stated in its opinion that the barges as appellees intended to construct them were in their principal component parts or members "reduced in strength as well as in weight, durability, size, and power of resistance." (R., 23). In short, the little, obscure notation of June 7, 1906, in drawing No. 2105, absolutely obliterated the specifications as to weight and dimensions of all materials entering into the construction of the barges.

The representatives of the Commission in executing the contract were evidently not conscious of this, and believed throughout, and until the list of materials came in, that the specifications would be met in

the construction of the barges. However this may be, if the contract is taken to be what the claimants insist it is then the contract was let without advertising and without opportunity for competitive bidding, since nobody was invited or had a chance to bid on such barges as the claimants proposed to construct.

In either view there was no valid contract, and the appellees were not entitled to recover.

Both propositions are argued in the Government's brief in opposition to the motion to dismiss or affirm, and it is not proposed to elaborate the argument.

This brief has been filed in order to present a consecutive narrative of the facts underlying the controversy between the parties.

In further support of the proposition that the Commission had no authority, without readvertising, to enter into a contract for barges of a radically different type from those originally specified, we cite:

Fones Hardware Co. v. *Erb*, 54 Ark. 645;
Mazet v. *Pittsburgh*, 137 Pa. St. 548;
Chippewa Bridge Co. v. *Durand*, 122 Wis. 85;
Packard v. *Hayes*, 94 Md. 233;
Detroit Free Press Co. v. *Auditors*, 47 Mich. 135;
Littler v. *Jayne*, 124 Ill. 123.

Respectfully submitted.

F. W. LEHMANN,
Solicitor General.

NOVEMBER, 1911.

○

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 85.

THE UNITED STATES, APPELLANT,

vs.

CHARLES E. ELLICOTT AND JOHN B. NORRIS, CO-PARTNERS, TRADING AS ELLICOTT MACHINE COMPANY, APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR APPELLEES.

Five briefs have been heretofore filed in this case, as follows:

Brief No. 1:

Motion to dismiss or affirm and brief in support thereof (filed by appellees).

Brief No. 2:

Brief in opposition thereto (filed by United States).

Brief No. 3:

Motion for additional findings of fact and brief in support of same (filed by United States).

Brief No. 4:

Reply brief (filed by appellees).

Brief No. 5:

Supplemental brief for the United States.

The filing of these various briefs and motions, together with the extraneous matter introduced into the record by the appellant, may lead to some confusion, and this brief is filed for the purpose of stating what in the opinion of counsel for appellees is now before this court for consideration.

Matters now open for review are grouped herein under four headings:

I.

Statement of the facts of the case as shown by the record.

These facts may be briefly summarized as follows:

After three separate advertisements by the Isthmian Canal Commission asking for proposals on six steel dump barges, covering a period of about two months, the said Commission accepted the bid of appellees, which was the lowest, to construct said barges.

Appellees' bid, together with seven others, was opened on June 8, 1906.

Appellees' bid apparently was not thoroughly understood by the Government officials, and numerous conferences were

had and letters passed between the various employees of the Government and the appellees for the purpose of explaining just what appellees proposed to furnish under its bid. These various matters, only some of which are referred to in the record, occupied some time, and it was not until August 17, 1906, that the contract which is in suit was entered into.

After the contract was executed and delivered, appellees were prevented from performing it because the Government employees, or some of them, thought that the specifications covering the barges, which specifications were made part of the advertisement and were also made part of the contract, should be literally carried out by appellees; wheeras, by the terms of the bid and contract, these specifications were modified so that the barges, while in all other respects similar to the ones detailed by the specifications, would when constructed be lighter in framing and plates.

This suit is the result of the refusal of appellant to allow appellees to construct the barges in conformity with the bid and contract.

With all the letters, testimony of the various interested parties, as well as the testimony of experts before it the Court of Claims decided the case in favor of appellees, and gave judgment on May 18, 1908, for ten thousand dollars ($10,000) against the United States.

The Government officials set up as a defense to the action that they did not understand appellees' bid nor the contract based thereon, and, charging fraud, misleading conduct, misrepresentation, etc., attempted to escape liability. The Court of Claims decided in most positive manner that there was no fraud, misrepresentation, nor unfair or unconscionable dealing on the part of appellees, and that there was no mutual mistake as to the subject-matter or terms of the contract, and that appellant is liable.

The Government finds itself in its present position as a result of lack of cohesion or co-operation in its various de-

partments having charge of this contract. We have, *first,* Mr. Shonts, chairman of the Commission, giving very little thought to the details of the office in respect to minor contracts such as this; *second,* Mr. Maltbie, the engineer, who was out of touch with the situation owing to the fact that he was located on the Isthmus of Panama, and, *third,* the man who had charge of the whole matter, Mr. D. W. Ross, general purchasing agent, located at Washington.

It may be admitted for the purpose of argument that there was a misunderstanding amongst these three gentlemen as to the exact character of the barge that the bid and contract called for. The striking point, however, is that Mr. Ross, who conducted the negotiations with the appellees, was not put on the stand by the Government, and, therefore, it cannot be claimed that he did not know exactly what were the modifications made in the specifications by appellees' bid and set out in the contract. As to the other two gentlemen, the Court of Claims has held, substantially, that if they did not know it was their own fault, as appellees did everything in their power to make their bid clear.

The manner in which the specifications were modified by bid and contract may not be entirely clear from the record alone, but whether these modifications were clear or made clear by appellees is a question of fact to be found and which was actually found by the Court of Claims, with all the testimony before it. The Court of Claims has decided that the modifications were clearly expressed and should have been understood by the Government employees; and, furthermore, that they were not radical and did not constitute a substitution of one thing for another.

II.

The motion to dismiss the appeal should be granted, because the same was not taken from the final judgment of the Court of Claims, and because it was not made within ninety (90) days from the rendition of the final judgment in the Court of Claims.

The motion to dismiss has been fully briefed and authorities noted, and nothing further need here be said.

See Brief No. 1, pages 1 to 13.
Brief No. 2, pages 8 to 16.
Brief No. 4, pages 26 to 29.

III.

Appellant's motion to remand the case for additional finding of fact should be dismissed, and the affidavit of S. S. Ashbaugh and the annexed overruled motions made in the Court of Claims should be stricken from the files.

The above propositions have been fully briefed, and further comment is unnecessary.

See Brief No. 4, pages 1 to 17.
Brief No. 3, pages 1 to 16.

Counsel for appellees have also set out the reasons why the other propositions contained in appellant's brief No. 2 are not properly open for consideration by this court.

See Brief No. 4, pages 23 to 30.

This leaves as the only remaining proposition to be considered the question of the departure of the bid and contract based thereon from the specifications accompanying the advertisement, and it is respectfully submitted—

IV.

That the Isthmian Canal Commission has authority in law to make a valid contract the terms of which modify the exact terms of specifications accompanying an advertised circular asking for proposals for work and materials.

It is apparent that the defense made by the Government to appellees' claim is an extremely technical one. It is not based on equity or business fairness, and would not be open to a private individual or a private corporation.

Ordinarily an agent acting within the apparent scope of his authority has the right to bind his principal. Ordinarily when the sovereign power comes down from its position of sovereignty and goes into the market to barter and contract it is treated just like any other contractor.

Ordinarily, the citizens of the United States have a right to expect as fair business treatment from their sovereign as they might expect from other citizens. The defense here set up goes counter to these various propositions, and in order that it may be availed of successfully, there must unquestionably be a clear case, coming exactly within the terms of the exception to the general rule.

The exception to the general rule may be stated as follows:

Government, State, and municipal authorities act through ministerial agents elected or chosen by the people. In making contracts for work for the sovereign they are usually limited in their authority. Such limits are shown by the laws of the jurisdiction within which they are acting. A citizen in dealing with these ministerial agents is presumed to know the extent of their authority as defined by the laws under which they are acting and is presumed to know that they cannot exceed their defined authority. If the citizen enters into a contract beyond the power of the minis-

terial agent to make, he must suffer, rather than the community at large, who if said contract was upheld would suffer from the unauthorized acts of its agent.

As a corollary to this proposition, it may be stated that a statutory requirement, authorizing ministerial agents to make contracts for work and material, only after public advertisement, and then only to the lowest responsible bidder, makes a limitation on said agents' powers which comes within the above enunciated principal, and a contract not made in conformity with such statutory requirements is void.

The reasons given for public advertisement and awarding the contract to the lowest bidder are stated by Dillon as follows:

> Dillon Municipal Corp. (5 Ed., 1911), sec. 809:
>
> "The purpose of a statute requiring the letting of bids to the lowest bidder is to invite competition, and to that end publicity of the intention to let the contract is of the essence of the proceeding. Hence, any *statutory proceedings requiring* advertisement, or specifying its nature, are usually to be regarded as *mandatory,* and a failure substantially to comply with their requirements is sufficient to avoid the contract. When the statute does not prescribe the time or the method of advertisement these matters are left to the discretion of the city council or of the board entrusted with the duty of making the contract."

And, again in section 802:

> "In discussing the nature of contracts which are excepted from the operation of statutes requiring competitive bidding, the court has said that the purpose of the statute is to insure economy in the public administration, and honesty, fidelity, and good morality in the administrative officers."
>
> "Competitive offers or bids have no other object but to insure economy and exclude favoritism and corruption in the furnishing of labor, services, prop-

> erty and materials for the uses of the city. This is the only purpose of the statutes, and when this effect is given them nothing further is needed."

This brings us to the discussion of the points which in the opinion of counsel for appellees clearly differentiate the present case from those cases set up by appellants.

First. Appellees must be charged with notice of the limitations existing in respect to the power of the Government agents to contract through some law, statute, ordinance, etc.

In the present case there was no statute requiring the Isthmian Canal Commission to advertise for bids and to award contracts to lowest responsible bidder.

(*a*) The Isthmian Canal Commission was created by act of Congress approved June 28, 1902, entitled "An act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific Oceans" (32 Stat., 483). Under this act the Isthmian Canal Commission was organized, and the seven members were appointed by the President. While said Commission was made "subject to the direction and control of the President," it was given full authority to proceed with the building of the canal and the purchase of all necessary supplies, machinery, etc. The act contains no requirement for advertising for the work, machinery, or supplies, nor the awarding of the contract to the lowest bidder in any case. Therefore, as far as any statutory notice of any limitations in the powers of the Commission is concerned, the appellees had none, for none was made. The Commission was given the broadest powers possible, and, apparently, any contract made by it, no matter how made, in connection with the construction of the canal, was valid and binding.

(*b*) It is true that the President, by a communication addressed to the Commission on April 1, 1905 (and which is found on page 483 of the Proceedings of the Isthmian Canal Commission), and, as far as we know, nowhere else,

stated substantially that contracts shall be made by the Commission only "after due public advertisement in newspapers of general circulation, and shall be awarded to the lowest responsible bidder." It is also true that in response to this direction of the President, the Commission adopted a set of resolutions found on page 492 of said Proceedings of the Isthmian Canal Commission which embodied the same language in regard to letting contracts as contained in the President's communication.

It must be apparent, however, that these resolutions passed by the Commission could be altered by the Commission. They have not the binding effect of a statute defining and limiting the powers of the Isthmian Canal Commission, and should not be considered as equivalent to a statute or law of which the public is presumed to have knowledge. They correspond to resolutions of directors or by-laws of a private corporation of which the public has no notice and are not comparable to a duly recorded charter which gives notice to all the world.

Not only this, but, granting that the appellees were charged with notice of the resolution, it is certainly very general in its terms. No time for advertising is mentioned nor what the advertisement should contain, which certainly indicates that the Commission did not intend to restrict itself, and has left to itself a large discretion, large enough without question to cover the present case, namely, a modification of its specifications after the same have been advertised.

When we compare the powers of the Commission in this respect with the limited powers of municipal agents awarding contracts under city charters or municipal ordinances, it is apparent that the many cases cited by appellant cannot be taken as conclusive of this question. Counsel for the Government are evidently aware of the weakness of their position on this point, and in Brief No. 2, page 24, have referred to section 3709 of the Revised Statutes. This section, however, does not impose the necessary limitations

required to support the Government's contention, as the awarding of the contract is not limited to the lowest bidder. Nor does the joint resolution referred to on page 25 of Brief No. 2 control, as this was not approved until June 25, 1906, and the advertising was made prior to June 8, 1908, and the bid made on that day. This ace does not call for an advertisement at all, and furthermore cannot be considered as retroactive and made to cover advertisements and bids made previous to its passage.

Second. The Isthmian Canal Commission are not "ministerial agents," comparable to agents acting for a city or State in carrying out a defined piece of work in a limited and defined manner.

It was optional with the Commission whether it ordered the barges at all. It did not by law have to buy these particular barges. The kind of barge desired was absolutely in its discretion. This illustrates the difference between the Commission and its limitations and the ordinary State or city agency directed by law to do a particular piece of work in a particular way and their limitations. In other words, the Commission has much broader powers, a much greater discretion, and is much less hampered in the exercise thereof than the ordinary State or municipal agent. This discretion is certainly broad enough to cover a change in the weight of a barge from that advertised.

Third. The question as the record stands in this court is in reality a question of fact.

There are two matters to be determined, and both have been decided by the Court of Claims in favor of the appellees:

(*a*) Was there a sufficient advertisement to promote economy, and was there any fraud or collusion?

(*b*) Was the modification material, so that the barge contracted for was not advertised?

These are not questions now open for review. The Court

of Claims has decided positively that there was more than a sufficient advertising to promote economy, and the bids themselves on the face show this result. The Court of Claims has also decided that there was no fraud or collusion and that the bid was fairly made and fairly accepted by the Government officials.

The Court of Claims has also decided that the modifications made by the bid and contract did not cause a substitution of something else for that which was advertised; that in all essential features the bid and contract followed the specifications, and that the modification was well within the powers of the Commission to make. These certainly are questions of fact and not questions of law. This court must confine its attention to what is properly in the record. The only fact on this point in the record is found in finding VII, which states that the component parts of the barge were reduced in strength and weight as compared to specifications, and this is qualified by Judge Atkinson in his opinion, when he holds that the reduction was an immaterial modification.

Practically the entire argument of counsel for appellant on this point is based on matters and facts not properly in the record.

Fourth. The convenience of the situation requires that the Government officials should be allowed some latitude to modify specifications annexed to advertisements when the contract is made and also to modify a contract after it is made.

If this court decided that after an advertisement was started no change could be made from its terms either when the contract was made or after it was made and the work started, without readvertisement and the awarding of a new contract, the business of the Government would come absolutely to a standstill.

The Government is contending for a decision which will

make it impractical to carry on its business. Modifications are the rule. It is common knowledge that it is impossible to frame plans and specifications on large and important works, so that the whole work can be carried through without any change. Another point for consideration is that the claim here asserted is made by the Government itself and not by a disgruntled bidder or a taxpayer, as is the case in most cases involving the question under discussion. The Government is pleading a technical disability contrary to what might be called the good business faith of the situation, and, like all pleas of this character, it is necessary that the disability complained of should be clearly established.

Fifth. Authorities.

There is a dearth of cases which can fairly be taken as analogous to the present case.

The case of Harvey *vs.* United States is somewhat nearer to the present case than any other case stated in the various briefs. This case was heard four times in the Court of Claims and twice in this court, as follows:

8 C. C., 501; 12 C. C., 141; 13 C. C., 322; 105 U. S., 671; 18 C. C., 470; 113 U. S., 243.

There the contractors, in response to an invitation for proposals for bridge work, bid on one part of the work, as they had a right to do under the terms of the advertisement. Through mutual mistake, the contract was drawn covering the whole work, and making several other important changes not in accordance with contractors' bid.

One of these changes allowed the Government to reduce the amount of the work from the plans and specifications advertised, and the contractors claimed the right to recover loss of profits on account of this reduction.

The point was made, although not specifically passed on, that the Government officials had no right to change the

contract from advertised specifications. The Court of Claims, however, upheld the contract, and only awarded damages allowable under the terms of the contract.

The claimants, realizing that the case was one for equitable relief, and that a court of equity could and would reform a contract entered into by mutual mistake, got a bill through Congress giving them the right to again present the case to the Court of Claims, and giving this court the right to adjudicate the case on equitable grounds.

At the trial of the first case it is apparent that claimants could have made the defense that the contract was not awarded as advertised, and was therefore void, if such a defense had been legally possible. By this means they could have thrown the contract out and then been able to assert that the real contract was to be found in the proposal and accepted bid.

While it is not clear that this point was made, still the court held that the contract, even though it was different from the bid and proposal, was valid and binding on the parties, and this was further emphasized later when the Court of Claims held that the contract was not subject to reformation, because the mistake in its terms was not the result of a mutual mistake. But this ruling was reversed by the Supreme Court, as the Supreme Court held that there had been mutual mistake.

The Supreme Court apparently adopted the lower court's theory that the contract was not invalid on account of a departure from bid and specifications, but did hold on equitable grounds that it should be reformed on account of having been entered into by mutual mistake.

Respectfully submitted,

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